

Volume 4

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 23-02880 JSC
)	SEALED PAGES 693-707 and
MICROSOFT CORPORATION, et al.,)	902-916
)	
Defendants.)	
_____)	

San Francisco, California
Wednesday, June 28, 2023

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS

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United States District Court - Official Reporter

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Wednesday - June 28, 2023

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(The following proceedings were heard in open court:)

THE COURT: We're opening the courtroom and going to begin the proceedings. I do want to remind those in the courtroom and those listening via Zoom audio that these proceedings are being recorded by this court.

Any other recording of this proceeding either by video, audio, including screenshots or live streaming or other copying of the hearing is strictly prohibited.

(Pause in proceedings.)

THE COURT: Is the FTC prepared to call your next witness?

MR. WEINGARTEN: We have a witness out of order. I think we have --

THE COURT: Oh, this is Microsoft's witness.

MR. WEINGARTEN: Yes, Your Honor. I think we have Mr. Nadella and Mr. Stuart left, but I think we're passing --

THE COURT: Okay. Is Microsoft prepared to call your next witness?

MS. WILKINSON: Yes, Your Honor. We call Bobby Kotick.

KOTICK - DIRECT / WILKINSON

1 **THE COURT:** Mr. Kotick, if you stop right there,
2 Ms. Means will swear you in.

3 **THE CLERK:** Please raise your right hand.

4 **BOBBY KOTICK,**
5 called as a witness for the Defendant, having been duly sworn,
6 testified as follows:

7 **THE CLERK:** Please state your name for the record.

8 **THE WITNESS:** Bobby Kotick.

9 **THE CLERK:** Thank you.

10 **THE COURT:** Thank you. You may be seated.

11 **DIRECT EXAMINATION**

12 **BY MS. WILKINSON:**

13 **Q.** Good morning, Mr. --

14 **THE COURT:** You may proceed.

15 **MS. WILKINSON:** I'm sorry, Your Honor.

16 **THE COURT:** You may proceed.

17 **BY MS. WILKINSON:**

18 **Q.** Good morning, Mr. Kotick.

19 **A.** Good morning.

20 **Q.** We have heard a lot about you and your company before you
21 came. So could you give just a brief introduction to the Court
22 of who you are?

23 **A.** Sure. I'm Bobby Kotick. I'm the CEO of Activision
24 Blizzard. I think this is my 32nd year in that role, and the
25 company started out, I just realized, in some ways in this

1 building. It was a bankruptcy and the bankruptcy court was
2 downstairs; and when my friends and I first purchased it, it
3 was an insolvent company and it had a history of great games
4 that had been developed mainly for the Atari and early video
5 game systems and it had lost its way; and we purchased control
6 of the company, and then started developing video games for a
7 variety of different formats.

8 **Q.** Great.

9 Let's go back just a few years, and can you tell us how
10 you first got involved with the software business?

11 **A.** Sure. I was in college and I was a history of art major.
12 I had a college roommate who was a computer engineer, and he
13 had seen -- he worked at Apple Computer in the summer of 1983,
14 and he saw a prototype of the Lisa computer and came back and
15 thought it would be a good idea to try and make something like
16 that, a graphical user interface and a mouse, for the Apple II.
17 So we started a business in Ann Arbor where we lived, we were
18 in college, making software for the Apple II and have been
19 making software ever since.

20 **Q.** So are you a graduate of the -- of Michigan -- University
21 of Michigan?

22 **A.** No. As part of the contract we had with Apple, Steve Jobs
23 actually made me quit college.

24 **Q.** And have you been in the software and gaming business ever
25 since?

KOTICK - DIRECT / WILKINSON

1 **A.** Yes.

2 **Q.** And about what year did you buy Activision out of
3 bankruptcy?

4 **A.** 1991.

5 **Q.** And can you tell us how the gaming market -- the status of
6 the gaming market at the time you bought Activision took
7 control?

8 **A.** So in the late '80s, early '90s, the principal place you
9 played video games would either be the Nintendo Family
10 Entertainment System or Sega or on personal computers, and most
11 of the cost was actually in the cartridges that the games came
12 on, and so the barriers to entry were somewhat high because you
13 needed a lot of capital to make those cartridges.

14 But Nintendo and Sega were the principal makers, and then
15 over time Sony entered the market, Microsoft entered the
16 market, and the business has evolved to be what's today
17 probably a \$130 billion-a-year industry.

18 **Q.** How would you compare that to the movie industry?

19 **A.** Well, I think if you look at the movie and television
20 around the world, I think it's something like \$700 billion, and
21 so it's still substantially bigger.

22 But I think the thing about video games, it's very
23 different than film and television. In film and television,
24 creators are focused on convincing you to believe the
25 characters on the screen so you're suspending your disbelief

1 and creating an emotional connection with those characters.

2 Our business is much more about you experiencing something
3 and feeling like you're in the action. You're flying a plane.
4 You're driving the car. And the story and character component,
5 that emotional connection, is -- it's not as relevant as
6 ensuring that you have a great visceral connection.

7 **Q.** Let's go to the 2000s when Sony was in the market and
8 Microsoft started in the market. What kind of platforms did
9 they have at that time?

10 **A.** What kind of platforms did Sony have?

11 **Q.** Yes.

12 **A.** So, you know, Sony is, and always has been, this
13 extraordinary consumers electronic company. If you think back
14 in the history of the company, they invented the Walkman, they
15 coinvented the CD. You know, they're one of the great
16 pioneering companies and probably the best company in the world
17 in consumer electronics in my view.

18 And in the early '90s they decided they wanted to create a
19 dedicated video game system, and so they put a team together
20 and they built the PlayStation; and when they launched it, it
21 was probably the best-designed video game system that had ever
22 been created.

23 **Q.** Let's focus a bit on where the market is today and we'll
24 go back, obviously, to Sony and to Microsoft.

25 Can you tell us where people are playing games today?

1 **A.** Well, the business has undergone this incredible
2 transformation. For most of the time that I've been in my job,
3 we're a business that sold to middle class consumers in
4 developed countries.

5 In the mid-2000s when the iPhone was introduced, that was
6 the transformation of the business where all of a sudden the
7 audiences became people of every economic strata and in every
8 country in the world. And so today the bulk of games are
9 played on phones, and that's been this dramatic shift but
10 that's really democratized the opportunity for game play.

11 **Q.** And when did that change really start where gamers started
12 to move to play primarily on mobile?

13 **A.** I would say we started to see it like 2010-2011 you were
14 seeing this big shift and phones were getting more capable and
15 more powerful, and the microprocessors that were in phones were
16 not dissimilar from those that were in prior video game
17 systems. So that's really where you started to see this
18 momentum pick up.

19 **Q.** Let's focus on Call of Duty, if we could, for a few
20 minutes.

21 Can you tell the Court how Call of Duty began?

22 **A.** Well, it actually began at a competitor of ours called
23 Electronic Arts. They had developed a game called Medal of
24 Honor, and it was successful and a lot of people at Activision
25 had been playing it and we thought: Wow, this is a really

1 great idea. It's public domain concept but you, you know,
2 think about sort of military conflict through history backwards
3 and forwards, and you would never really run out of ideas if
4 you actually used that as a construct.

5 And we liked the idea of having something that you knew
6 that you could envision what the sequel content would be, and
7 so we put a team together and the first game was a World War II
8 based game and that was, I think, in 2003 and it's evolved
9 since then.

10 **Q.** So let's go back to your concept of sequels.

11 Back when Call of Duty was starting, was it common in the
12 gaming development business that people were making sequels
13 from the -- you know, based on the initial IP?

14 **A.** There -- the nature of the business, people are so
15 intellectually curious who make games and so I don't -- I don't
16 think it was easy early on to get people to want to work on a
17 sequel. They wanted to do something new.

18 So we had to instill a discipline and a compensation and
19 reward system that actually rewarded you to stay focused on
20 developing sequels based on original games.

21 **Q.** The first time Call of Duty came out, was that a
22 multiplayer game or a single-player game?

23 **A.** The focus of the -- of that first game was very much a
24 campaign, but the big evolution of the industry has been this
25 transformation to the social experience. And so you really

1 started to see games take off when you had the ability to
2 communicate with another player, play against another person.
3 And this is when I think we shifted from being this solitary
4 form of entertainment, you against the game machine or
5 computer, to you playing with your friends, and it became more
6 like sport. So you had the ability to compete. You could play
7 in tournaments. You had a social experience. So you could get
8 together with your friends and play. And that really, I think,
9 started to transform the business and make it even more
10 popular.

11 Q. Okay. So the first year was campaign only?

12 A. Let's see, 2003, I -- that was -- I'm not -- I can't tell
13 you for certain. There may have been a multiplayer component
14 to it, but my recollection is I think it was just campaign.

15 Q. When you use the word "campaign," do you mean what you
16 just described, which is I, the player, play against the game
17 and I'm not playing against my friends or --

18 A. Yeah, you're playing in the solitary experience.

19 Q. After that first year, did Call of Duty become a
20 multiplayer game?

21 A. Call of Duty is a multiplayer game.

22 Q. Has it always been a multiplayer game since that time?

23 A. It has.

24 Q. What about multiplatform? What does that mean?

25 A. The way I would describe that is that it's available on

1 every device that has a microprocessor and a display that's
2 capable of delivering that kind of experience.

3 Q. When you first announced the very first version of Call of
4 Duty, was that available on more than one platform?

5 A. Yes.

6 Q. Which platforms, if you recall?

7 A. That's a great question. Let's see, it was probably
8 PlayStation -- the end of the life of PlayStation 2,
9 PlayStation 3, Xbox 360, PC. I don't remember exactly.

10 Q. Okay. And every year since then, has Call of Duty been
11 available on more than one platform?

12 A. Yes.

13 Q. Has it ever been exclusive in terms of only available on
14 one platform?

15 A. No.

16 Q. Why is that? Why have you maintained it as a
17 multiplatform game over the years?

18 A. Well, if you think about like from a business perspective
19 and from a consumer perspective, one of the most important
20 things is building communities of players, especially now that
21 you have the ability to compete and socialize. And so our view
22 has always been that you want to create your content for as
23 many platforms as possible and build your audiences to be as
24 big as possible.

25 Q. Did there come a time when players could play Call of Duty

1 even if they didn't own the same platform?

2 **A.** Sure.

3 **Q.** Why is that beneficial for the game and for the community
4 and your business?

5 **A.** Well, it just expands the market and also makes you --
6 let's say you have a group of friends, not everybody's going to
7 have the same device so it gives you the opportunity to be able
8 to play with your friends.

9 **Q.** Have you ever contemplated over the years making Call of
10 Duty exclusive to one platform?

11 **A.** Not really.

12 **Q.** And do you currently see any reason why either you, as the
13 CEO of Activision, or Xbox would ever want to take Call of Duty
14 exclusive to one platform?

15 **A.** No.

16 **Q.** Why?

17 **A.** Well, you would alienate this -- we have a hundred million
18 monthly active players. Half of them play on phones but the
19 rest of them play on computers and Xboxes and PlayStations, and
20 you would have a revolt if you were to remove the game from one
21 platform.

22 **Q.** As the CEO of a gaming business, in the past have you
23 heard loud and clear messages from the gaming community?

24 **A.** Gamers are incredibly passionate. Because of the nature
25 of the experience, you get very invested in the experience.

1 Like I said, in many cases because they're like competitive
2 play. It's like a sport.

3 And so with that kind of investment in time and effort,
4 you have an enthusiastic, passionate group of people, and they
5 just -- they take the gaming experience very seriously.

6 **Q.** You said you have about a hundred million active gamers;
7 is that right?

8 **A.** For Call of Duty about a hundred million monthly active
9 users.

10 **Q.** Let's talk about those hundred million folks.

11 Are they all amateurs? Are they all groups of friends?
12 How would you categorize how people play Call of Duty?

13 **A.** That's a pretty broad range. Some people -- you know, the
14 phone games are more casual, but people play them in different
15 circumstances, and I would say it's a -- you know, it's pretty
16 representative of the world. It's predominantly male, but I
17 think the game is available in something like 200 countries.

18 **Q.** And are there professional Call of Duty players?

19 **A.** There are.

20 **Q.** What does that mean?

21 **A.** So they play professionally competitively. In fact, we
22 have a league called the Call of Duty League with team owners
23 much like a traditional sport, and they play in organized
24 competitions against each other.

25 There's a whole group of amateur players but who also

1 compete, and then there is what I would call semiprofessional
2 players. But, you know, it's -- it's now become an opportunity
3 where if you are not -- don't excel at a traditional sport, you
4 actually have the ability to have the camaraderie and
5 connection and the same kinds of experiences that you might
6 have if you were playing a traditional sport.

7 **Q.** If I were to draw my circle of a hundred million monthly
8 active users, is there a subgroup of that that plays daily?

9 **A.** Sure. I mean --

10 **Q.** What do you call those folks or how do you keep --

11 **A.** We would call them like daily active users.

12 **Q.** And do you have an idea of approximately how many daily
13 active users you have for the COD games?

14 **A.** Can I guess?

15 **Q.** No, you can't. You can give us an estimate if you know.
16 If you don't --

17 **A.** I would say 7 to 10 million players.

18 **Q.** Okay. So 90 percent of the people or so that play are not
19 on Call of Duty every day playing?

20 **A.** Well, the monthly active users all play monthly, but on
21 any given day there's probably 7 to 10 million people playing.

22 **Q.** Let's turn to the different games or titles that fall
23 under the Call of Duty rubric.

24 Where do you have those games available and -- well, let's
25 just start. What are the different versions of those games

1 that you have that would fall under the Call of Duty franchise?

2 **A.** So, like I said, the bulk of players are playing on
3 phones. Then you have probably 20 -- 20-some odd percent
4 playing on personal computers and then there's probably, let's
5 say, 15 or 16 percent that play on PlayStation and probably 7
6 or 8 percent that play on Xbox.

7 **Q.** Is there a Call of Duty game, Call of Duty War Zone,
8 that's free-to-play?

9 **A.** Yeah. I think that's a very important part of how the
10 business has evolved. One of the things that we realized is
11 that the way you build big communities of players is make the
12 games available for free.

13 So, for us, you know, our main focus as a company is
14 making sure that each one of our games is first available free
15 on as many formats as we can create; and then you have the
16 ability to have players invest in different ways, but they also
17 don't have to invest at all.

18 **Q.** So the investment is the in-game monetization? They can
19 buy things while they're playing?

20 **A.** Yes.

21 **Q.** So Call of Duty War Zone, the free-to-play game, is that
22 available on PlayStation 5 and Xbox?

23 **A.** Yes.

24 **Q.** Is that available on PC?

25 **A.** Yes.

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1 Q. And is that available on mobile?

2 A. It will be this fall.

3 Q. Okay. And is there another Call of Duty mobile game
4 available today for people who use their phones?

5 A. Yeah. It's not linked to the other games. It's its own
6 game, but it's available today and it's widely played.

7 Q. So people who like to hear that Call of Duty War Zone is
8 coming to phones, why did you decide to put that specific title
9 onto mobile -- design that game specifically for a mobile
10 phone?

11 A. Because it's the biggest part of the market.

12 Q. Okay. And based on your experience, where do you see the
13 market going in the next five to ten years in terms of
14 platforms and the ability to access games?

15 A. Most of my five- to ten-year predictions have not been
16 that accurate, but --

17 Q. We'll get to that. We'll get to that.

18 A. -- I would say that the growth of gamers and gaming will
19 continue principally on phones. And, you know, that's what we
20 have seen's has been the majority of the growth over the last
21 decade, and that I think will continue as phones continue to
22 get more powerful.

23 And you look at the chips that are being incorporated into
24 phones today, they're the equivalent of what you might have
25 seen in the past in a dedicated video game system. So I would

1 say phones are going to have a very important role in the
2 growth of the business.

3 Then you look at companies like Meta with the Oculus VR or
4 Apple just announced the VR headset, and so we're going to
5 think out five to ten years I think the VR opportunities are
6 going to expand, and that will be another interesting area for
7 development.

8 **Q.** We have --

9 **THE COURT:** But are the mobile games multiplayer as
10 well?

11 **THE WITNESS:** Yes.

12 **THE COURT:** And can an Android play against an iPhone?

13 **THE WITNESS:** It can.

14 **BY MS. WILKINSON:**

15 **Q.** We haven't said much about Nintendo. At one time did you
16 have Call of Duty titles available on Nintendo?

17 **A.** Yes.

18 **Q.** And around 2013 did that end?

19 **A.** I don't know the specific year. I think the last one was
20 on the Wii U.

21 **Q.** Before the Switch was coming onto the market, did you
22 consider whether to put Call of Duty on the Switch?

23 **A.** Yes.

24 **Q.** Why didn't you?

25 **A.** I made a bad judgment. I -- when I had seen the prototype

1 of the Switch, it was very different than -- when I saw the
2 prototype of the Wii, I thought it was the most extraordinary
3 video game system that was ever created, and it really was
4 transformative in our industry because it made games very
5 physical.

6 When I saw the prototypes for Switch, I was concerned
7 that -- because they were trying to accomplish a lot. It was a
8 console but also had a portable capability. I didn't think it
9 was going to be wildly successful.

10 Q. How did that turn out for you?

11 A. It's probably the second-most successful video game system
12 of all time, so it was a bad -- bad decision on my part.

13 Q. Okay. Somehow you've muddled through, though; right?

14 A. Muddled through.

15 Q. Okay. Let's talk a little bit about Call of Duty revenues
16 and where they come from generally.

17 In terms of platforms, percentage-wise where do your
18 revenues come when you compare the PlayStation 5 to the Xbox X
19 and S series?

20 A. Oh, I would say the PlayStation revenues are probably
21 twice the Xbox revenues.

22 Q. Is that consistent with the idea that there's twice as
23 many Call of Duty gamers on PlayStation versus Xbox?

24 A. We have to remember the PlayStation has the benefit of
25 Sony's breadth of distribution.

1 Q. Explain that a little more.

2 A. So Sony is -- you know, in my view is the most successful
3 consumer electronics company of all time and they have
4 distribution in every country, in every small town, everywhere
5 in the world. And so, you know, they sell televisions and they
6 have phones and they have every type of consumer electronics
7 product, so they have this incredible breadth of distribution
8 and very recognizable brand and that's enabled them to have
9 this disproportionate market share everywhere in the world.

10 Q. How do you assess their ability to develop new IP? Is
11 there anything unusual about Sony especially in comparison to
12 Xbox?

13 A. Yeah. They have an enormous competitive advantage. They
14 own Sony Music, Sony TV, and Sony's film library and so they
15 have, you know, thousands of different intellectual properties
16 that they can commercialize into video game content.

17 They also have the ability to do something that is really
18 difficult to do and they did it incredibly successfully with
19 The Last of Us. So they were able to take a very popular video
20 game and turn it into one of the most successful TV shows of
21 all time.

22 Q. Why is that beneficial?

23 A. Well, again, if you think about the nature of our players,
24 they love the idea that they are intellectual property, that
25 they are so invested in as a game comes to a big screen or a

1 small screen.

2 I also think that by being on television or film, it
3 actually gives them the opportunity to expand the audience for
4 those games to people that might not otherwise play them.

5 Q. Do you have any concern that if the transaction goes
6 through and Activision becomes part of Xbox, that Sony will
7 have any difficulty having a competitive response in competing
8 against Xbox?

9 A. From what perspective?

10 Q. Will they be able to develop new games?

11 A. Yeah. They have enormous amount of development capacity.
12 They own some of the very best game developers in the world.

13 Q. And where have they been in terms of the market for
14 consoles for the past 20 years?

15 A. I think PlayStation 2 is probably the best-selling video
16 game system of all time, but they've generally had -- since
17 they launched PlayStation, been the dominant player in the
18 video game console industry.

19 Q. And you told us that it wouldn't make any sense to take
20 Call of Duty off a platform like PlayStation; right?

21 A. Not just it wouldn't make any sense, it would be very
22 detrimental to our business.

23 Q. So it would be detrimental to the business because of how
24 players would respond?

25 A. How players would respond.

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1 Q. What else?

2 A. Where we generate revenues from. You know, there's always
3 opportunities to have different types of innovation and you
4 want to take advantage of that innovation, but our -- if we
5 were to remove Call of Duty from PlayStation, it would have
6 very serious reputational -- it would cause reputational damage
7 to the company.

8 Q. And before you signed the merger agreement with
9 Mr. Spencer and the folks at Microsoft and since then, have
10 they ever discussed with you that they want to pull Call of
11 Duty from PlayStation?

12 A. No.

13 Q. Never part of any conversation you've had with them?

14 A. No. I'd say the opposite. They've always said that
15 they're a multiplatform company, and that we would make it
16 available on every platform.

17 Q. Let's go back to mobile for a moment, if we could.

18 In 2016 did you buy a company named King?

19 A. We did.

20 Q. And what did -- at that time what was King doing?

21 A. King was one of the most successful mobile game companies
22 in the world.

23 Q. And has the value of King increased since you bought it?

24 A. Yes.

25 Q. And what are the most popular games that King develops?

1 **A.** So the ones -- the Candy Crush is the biggest and then
2 they have a game called Pet Rescue, another called Farm Heroes,
3 another called Bubble Witch, but Candy Crush is virtually all
4 of the revenues of King.

5 **Q.** Are all of those mobile games free-to-play?

6 **A.** They are.

7 **Q.** And is there additional skills that the King folks bring
8 not to just develop the game itself but how you actually
9 attract and retain consumers on a mobile device versus a
10 platform?

11 **A.** Yes.

12 **Q.** And what -- you've seen that since you took them over.
13 What is that that they do so different in mobile versus
14 platform?

15 **A.** Well, for starters it's a very different experience
16 because you're playing it on a small screen and you're using
17 the touchscreen as the interface. I think that was really
18 where this model of free-to-play started.

19 And the successful mobile game companies were all very
20 focused on the idea of building these big communities of
21 players, and then they -- they do a very good job of blending
22 creativity and inspiration in the product development function
23 with commercial thinking and commercial capability.

24 The -- the thing about mobile games is because they're
25 free-to-play, a very small percentage of the people who play

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1 those games actually pay. So in the case of a game like
2 Candy Crush, maybe 2 percent of the 150 million monthly active
3 users pay for the game and then you have supplemental forms of
4 monetization like advertising.

5 **Q.** So you have 150 million monthly average users for
6 Candy Crush and a hundred million for Call of Duty?

7 **A.** Yes.

8 **Q.** If you -- or have you ever seen your developers in any
9 game, but we're really focused on Call of Duty, be willing or
10 even considered to produce a game that was subpar for a certain
11 platform?

12 **A.** No.

13 **Q.** Can you ever imagine your developers wanting to or being
14 persuaded to develop a subpar version of a game to put on a
15 certain platform?

16 **A.** No.

17 **Q.** All right. So we're calling that degrading the game. Why
18 would that not be something that anyone would want to do?

19 **A.** Oh, multiple reasons. For starters, in order to do that,
20 you would have vitriol from gamers that would be well deserved,
21 and you would see that being something that would be very vocal
22 and also cause reputational damage to the company.

23 The other thing is, most of the people who make video
24 games, they're -- they take great pride in the work that they
25 do, and so they always want to put their best foot forward and

1 deliver the best experiences that they can.

2 Q. Have you ever heard of developers developing a subpar game
3 for one platform versus another?

4 A. You mean intentionally doing it?

5 Q. Yes.

6 A. No.

7 Q. Are there different features that are available on
8 different devices?

9 A. Yes.

10 Q. And sometimes have there been in the past different maps
11 or weapons or things that you could buy on one platform versus
12 another for Call of Duty?

13 A. Sure.

14 Q. But you don't consider that degrading the experience for
15 one player on a platform versus another, do you?

16 A. No. That's more --

17 Q. Why not?

18 A. It's just more marketing, more promotional kinds of ideas.

19 Q. Okay. I want to talk about the two other topics that have
20 come up in this case, which are putting games into subscription
21 services for content library and streaming.

22 You have strong views on both of those ideas, do you not?

23 A. I'm generally considered a strong-view person when it
24 comes to that.

25 Q. Okay. Well, let's start with how you've looked at over

1 the years whether you should put Call of Duty, or any of your
2 games, into a subscription content library service.

3 **A.** So I have a general aversion to the idea of a multigame
4 subscription, and maybe part of it is being in Los Angeles and
5 having watched the big media companies move their content to
6 these subscription streaming services and the business results
7 have suffered, most everyone of those companies, as a result.

8 We also have a game that has a subscription called World
9 of Warcraft, and our players pay us \$15 per month for that
10 single game.

11 So the idea of having a game in a multigame subscription
12 service I think would degrade the economics, and it's not --
13 it's inconsistent with the idea of starting out with
14 free-to-play as the way that you build game universes and
15 franchises and then having multiple forms of player investment
16 that gives flexibility to the player.

17 **Q.** Have you made your views known to people in the gaming
18 industry?

19 **A.** They are widely known.

20 **Q.** So when Mr. --

21 **THE COURT:** I'm sorry. Can I interrupt you?

22 **MS. WILKINSON:** Yes, please. Of course.

23 **THE COURT:** For the World of Warcraft subscription,
24 why would anyone pay \$15 a month to play as opposed to just pay
25 \$70 and have it? What does the monthly subscription give you?

1 **THE WITNESS:** It was developed almost 20 years ago,
2 and it's a really rich game experience where the players are
3 playing for longer hours than most, and historically what we've
4 done is tried to introduce new content that you wouldn't have
5 to necessarily pay for. So you play the game. You pay your
6 \$15 a month. We'll deliver you new content that you wouldn't
7 necessarily have to pay for.

8 **THE COURT:** I see. If you had the console or that you
9 bought it, you'd have to pay for these things, but it's sort of
10 a an all-in, an all-you-can-eat fee?

11 **THE WITNESS:** There -- sometimes there's special
12 content that we will charge for or valuated services. For the
13 most part, you get to play the game and, you know, whatever we
14 create, we're going to give you new patches and updates.

15 It's not a big audience of players, but it's -- it shows
16 that there's an opportunity -- and it's a hard one to actually
17 create. There aren't very many examples of games that have a
18 subscription model that have been successful for that long.

19 **BY MS. WILKINSON:**

20 **Q.** Going back to the content -- the library content model,
21 that's many games available, right, to someone who buys into
22 that subscription?

23 **A.** Yeah, theoretically.

24 **Q.** You heard Mr. Ryan say yesterday that he didn't even ask
25 you whether you would put Call of Duty into his subscription

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1 service because he knew you wouldn't do it. Is that true?

2 **A.** If Mr. Ryan said it, I assume it's true.

3 **Q.** Is it true that you wouldn't do it?

4 **A.** I wouldn't.

5 **Q.** And but for this transaction, would you put Call of Duty
6 into Game Pass?

7 **A.** No. We've never put a single title into Game Pass.

8 **Q.** And without describing in detail your future plans,
9 assuming the transaction did not go forward, do any of your
10 future plans include putting Call of Duty into any kind of
11 content subscription -- content library subscription service?

12 **A.** No. In our current long-range plan, we don't have any
13 revenues that are being generated from a multigame subscription
14 service.

15 **Q.** What about streaming of your console and PC games? Do you
16 allow streaming services to stream Call of Duty?

17 **A.** We have experimented with a few of them but, again, I
18 don't really think that's a big opportunity for the company.

19 **Q.** When you say you experimented, did you experiment with
20 some service before it was commercialized to see whether it
21 would be doable?

22 **A.** Yeah. For example, Nvidia had a service which you had to
23 own the game. So let's say you owned a version of Call of
24 Duty, it was almost like you had the ability then to play it on
25 devices other than in your home. So if you didn't have your

1 disk or you didn't have your account with you, you would be
2 able to play it somewhere else, and we tried that as an
3 experiment.

4 **Q.** We've heard testimony that one of the reasons Xbox is
5 interested or was interested in streaming is they thought they
6 could get onto mobile and avoid the app store issue that they
7 have.

8 What is your opinion about the ability to take a console
9 game and stream it onto a phone and provide a, you know, good
10 gaming experience for Call of Duty players?

11 **A.** If you look at the plans of Samsung and, you know, all the
12 other major phone companies, the microprocessors that are being
13 incorporated into phones today are these octa-core processors.
14 They have AI cores. They have graphics processing. They have
15 memories. So they're as powerful and capable as some video
16 game consoles.

17 And I don't think that -- with all the risks of latency
18 and storage, I actually think the playing the game on the phone
19 using the local processor is going to be a much greater
20 opportunity for us than the idea of streaming.

21 **Q.** And is your upcoming Call of Duty War Zone that's been
22 developed for mobile an example of that?

23 **A.** Yes.

24 **Q.** So that's what is -- what we call a native game to the
25 phone?

1 **A.** Sure.

2 **Q.** Okay. And what would happen if someone streamed today's
3 Call of Duty that's designed, let's say, for the Xbox onto
4 their phone? What kind of experience would they have?

5 **A.** I doubt it would be a very good one.

6 **Q.** Why?

7 **A.** Well, all the reasons I mentioned, but the -- if you think
8 about processing in the cloud, I think there was a -- you know,
9 some years ago there was this view that you could actually more
10 cost efficiently deliver processing in the cloud. But I think
11 what people have come to realize is that the local devices,
12 whether it's a computer or a phone or a console, the processing
13 capabilities are advancing at very rapid rates, and so it's not
14 more efficient to process in the cloud.

15 **Q.** And with a console game being played on a tiny screen, are
16 there also disadvantages for just the design transferring to a
17 mobile phone?

18 **A.** Yeah. When you're playing a console game, you're using a
19 dedicated controller and that's a different way to interact
20 with the game than with a glass on a touchscreen. So that
21 wouldn't really work so well.

22 **Q.** Today could a player stream Call of Duty from any platform
23 to another platform?

24 **A.** No.

25 **Q.** You haven't given those rights to anyone?

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1 **A.** No.

2 **Q.** And I ask you the same question about subscription
3 services. Absent the deal, do you have any plans to put -- or
4 permit Call of Duty to be streamed?

5 **A.** No.

6 **Q.** Last set of questions.

7 Mr. Kotick, do you want this deal to go through?

8 **A.** Very much.

9 **Q.** Why?

10 **A.** Well, for starters, 98 percent of our shareholders voted
11 for the transaction and my responsibility is to make sure that
12 we honor the obligations we have to our shareholders.

13 **Q.** Do you have voting control of your shareholders --

14 **A.** No.

15 **Q.** -- or their shares?

16 So you have to act in the best interest of all of those
17 shareholders?

18 **A.** Yes.

19 **Q.** What about if this transaction is enjoined and the parties
20 have to go into the administrative process?

21 **A.** My board's view is that if the preliminary injunction is
22 granted, that they don't see how the deal could continue.

23 **Q.** Okay. Thank you very much.

24 **A.** Sure. Thank you.

25 **MR. WEINGARTEN:** Your Honor, my colleague Maria

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1 Cirincione will be handling the cross-examination.

2 **THE COURT:** Great.

3 **MS. CIRINCIONE:** Good morning again, Your Honor.
4 Maria Cirincione for the Federal Trade Commission.

5 May I approach the witness?

6 **THE COURT:** You may.

7 **CROSS-EXAMINATION**

8 **BY MS. CIRINCIONE:**

9 **Q.** Good morning, Mr. Kotick.

10 **A.** Good morning.

11 **Q.** As CEO of Activision, you answer to the Activision board
12 of directors; correct?

13 **A.** Yes.

14 **Q.** And in your role, you have a duty to maximize shareholder
15 value; right?

16 **A.** Yes.

17 **Q.** Activision has the broad and deep capabilities that are
18 required to sustain AAA games; right?

19 **A.** Yes.

20 **Q.** And Activision has the broad and deep capabilities that
21 are required to create AAA games every year; right?

22 **A.** Well, we -- it is somewhat of a hit-driven business. So,
23 yes, we have that capability but that doesn't always translate
24 into AAA titles. There are instances where we might miss the
25 mark.

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1 Q. Many of Activision's games are beloved and iconic;
2 correct?

3 A. Yes. We like to think so.

4 Q. And the industry thinks so too?

5 A. Sure.

6 Q. Iconic because of their duration; right?

7 A. I haven't really spent the time to think about the
8 definition of "iconic," but I would say partly it's duration,
9 popularity, the joy, and fun that people experience from them.

10 Q. One of those beloved and iconic games is Call of Duty;
11 right?

12 A. Yes.

13 Q. And gamers have been playing Call of Duty for the last
14 20 years; right?

15 A. Yes.

16 Q. Since 2003, Activision has released a new Call of Duty
17 title every year except for one year; right?

18 A. Yes, more or less.

19 Q. And as of 2021, Call of Duty was the number one selling
20 console game for 13 years in a row in the United States; right?

21 A. I think so.

22 Q. And then in 2022, Activision released Call of Duty Modern
23 Warfare 2; right?

24 A. Yes.

25 Q. And that launch smashed records dating back 20 years for

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1 the Call of Duty franchise; right?

2 **A.** Yes.

3 **Q.** Call of Duty Modern Warfare 2 made a billion dollars
4 within ten days of launching; right?

5 **A.** It did.

6 **Q.** If you could, Mr. Kotick, take a look at a document marked
7 as PX9165.

8 (Pause in proceedings.)

9 **BY MS. CIRINCIONE:**

10 **Q.** This is Activision's press release following Call of Duty
11 Modern Warfare 2's launch, and it was released on November 7,
12 2022; right?

13 **A.** I don't see that document.

14 **Q.** It should be behind a tab marked PX9165.

15 **A.** (Witness examines document.) Okay.

16 **MS. CIRINCIONE:** Your Honor, I move to admit PX9165
17 into evidence, please.

18 **THE COURT:** Admitted.

19 (Trial Exhibit 9165 received in evidence.)

20 **BY MS. CIRINCIONE:**

21 **Q.** And Call of Duty Modern Warfare 2 didn't just break the
22 20-year franchise record, it was also the highest grossing
23 entertainment opening of the year; right?

24 **A.** Yes.

25 **Q.** And when we say "highest entertainment opening," that

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1 includes games, TV, and movies; right?

2 **A.** I think we've -- it's more comparable to like the box
3 office, but it would probably include television. It would be
4 hard to figure out how to calculate that.

5 **Q.** Can you turn, Mr. Kotick, to PX7035 in your binder? This
6 is your deposition transcript.

7 **A.** (Witness examines document.) Yes.

8 **Q.** And when you testified at your deposition, Mr. Kotick, you
9 testified under oath; correct?

10 **A.** Yes.

11 **MS. WILKINSON:** Excuse me, Counsel. Could you give us
12 the page?

13 **MS. CIRINCIONE:** Yes. I'm getting there.

14 **BY MS. CIRINCIONE:**

15 **Q.** If you could turn to page 26, please.

16 **A.** (Witness examines document.)

17 **Q.** And line 8 -- I'm sorry, line 7, you were asked a question
18 (as read):

19 **"QUESTION:** What does that mean, of all entertainment
20 types?"

21 And you answered (as read):

22 **"ANSWER:** The way we think about is compared to the
23 opening of a film, that will probably be the principal
24 thing where you would be able to have an apples-to-apples
25 comparison or the dollar value, I guess, of the television

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1 program.

2 **"QUESTION:** Anything else within that phrase,
3 'entertainment sites,' besides film and television?

4 **"ANSWER:** That's how I think of it. There may be a way
5 that -- there may be something else in the definition, but
6 I think typically that's what we would need."

7 And your testimony here, Mr. Kotick, was truthful and
8 accurate?

9 **A.** Yes.

10 **Q.** Call of Duty Modern Warfare 2 beat the day one record of
11 any title on the PlayStation; correct?

12 **A.** I believe so.

13 **Q.** You're not aware -- I'm sorry?

14 **A.** For that year?

15 **Q.** Yes, for that year.

16 **A.** Yes.

17 **Q.** You're not aware of any other console games with a more
18 successful launch; correct?

19 **A.** I'm not sure about Grand Theft Auto, but I think we
20 generally have always been the most successful of the -- of
21 those types of games.

22 **Q.** We've talked about now how Call of Duty has been the
23 number one franchise for the last now 14 years, including 2022.
24 The 2021 Call of Duty title was Vanguard; right?

25 **A.** Yes.

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1 **Q.** That Call of Duty title was a disappointment for you;
2 right?

3 **A.** It was disappointing in the commercial results, but I
4 think creatively it was a good game.

5 **Q.** Yet again, it was the number one selling console game in
6 the United States in 2021; right?

7 **A.** Yes.

8 **Q.** And that same year the number two title was also a Call of
9 Duty title. That was Call of Duty Black Ops Cold War; right?

10 **A.** I believe so.

11 **Q.** Activision's Diablo franchise also just released a new
12 title; right?

13 **A.** Yes.

14 **Q.** Activision launched Diablo IV earlier this month?

15 **A.** We did.

16 **Q.** It also was a record-breaking launch; right?

17 **A.** For Blizzard it was a record-breaking launch.

18 **Q.** Let's take a look at PX9441, please.

19 **A.** (Witness examines document.)

20 **Q.** This is Activision's press release for Diablo IV released
21 on June 12th, 2023?

22 **A.** Yes.

23 **MS. CIRINCIONE:** Your Honor, I move to admit PX9441
24 into evidence, please.

25 **THE COURT:** Admitted.

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(Trial Exhibit 9441 received in evidence.)

BY MS. CIRINCIONE:

Q. As you said, Diablo IV was a record-breaking launch. It made over \$666 million in its first five days after the launch; correct?

A. Yes. It's a little different than Call of Duty because we have only been able to do this every decade.

Q. The Diablo IV launch was record breaking for all Blizzard games; right?

A. Yes.

Q. And not only did Diablo IV have a record-breaking launch for Blizzard, it also had the box office equivalent of the biggest opening week of the year; correct?

A. Where do you see that?

Q. The first paragraph, last sentence.

A. (Witness examines document.) Yes.

Q. Activision doesn't make a console; right?

A. We don't.

Q. Activision doesn't have a multigame subscription service like Game Pass; right?

A. We don't.

Q. Activision doesn't offer a cloud streaming service like Game Pass; right?

A. We do not.

Q. Activision's core business is making games; right?

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1 A. Yes.

2 Q. And from Activision's perspective, it's up to the player
3 to decide how they want to access their games; right?

4 A. Sure.

5 Q. When it comes to where Activision offers its games,
6 Activision is platform agnostic; correct?

7 A. Generally speaking.

8 Q. That means Activision wants to make its games available
9 wherever players want to be playing them; right?

10 A. That's our aspiration.

11 Q. Activision wants to be on whichever platforms its
12 communities are using; correct?

13 A. Yeah, generally speaking.

14 Q. And if there's a device capable of delivering Activision's
15 games, Activision wants their games on that device?

16 A. Yes.

17 Q. You testified just a few moments ago that you wouldn't
18 degrade Call of Duty. That's your perspective as an
19 independent developer; right?

20 A. Yes.

21 Q. You also previously testified about offering Call of Duty
22 on multiple platforms, and you said you've never launched only
23 one console; correct?

24 A. Well, that was -- I was asked about Call of Duty.

25 Q. Yes. I am asking about that too.

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1 **A.** Yeah, Call of Duty I don't believe we've ever launched on
2 just a single console.

3 **Q.** But Activision has signed agreements with platform owners
4 to launch Call of Duty on the platform first before other
5 consoles; right?

6 **A.** It's possible. I can't -- I don't know exactly but that's
7 possible, sure.

8 **Q.** Activision hasn't had agreements with Sony and Microsoft
9 to make a Call of Duty title available on one platform or the
10 other before the opposite platform?

11 **A.** I mean, sitting here I can't tell you specifically, but
12 it's possible.

13 **Q.** You also testified that Activision made content or
14 features available on one console versus another; right?

15 **A.** Yes. What I was explaining is it -- you know, different
16 devices have different capabilities and you try your best to
17 take advantage of the unique capabilities that the device would
18 offer.

19 **Q.** That's a different player experience for a player
20 depending on which console they choose to buy?

21 **A.** Yeah, it can be a different experience.

22 **Q.** You testified previously that you have a philosophical
23 aversion to subscription services; correct?

24 **A.** Yes.

25 **Q.** Your aversion isn't based on any specific metrics; right?

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1 **A.** It's just on the idea that when you aggregate all of this
2 type of content into a single service, that's not the best way
3 to provide player investment opportunities or returns to your
4 shareholders.

5 **Q.** I'll ask again my specific question. Your aversion isn't
6 based on any specific metrics?

7 **A.** No.

8 **Q.** And your aversion isn't based necessarily on
9 cannibalization; right?

10 **A.** Not necessarily, but cannibalization would play a role in
11 that.

12 **Q.** Your aversion to subscription -- your philosophical
13 aversion to subscription services is based on your own personal
14 view about the best way to create financial opportunity for
15 games; right?

16 **A.** And the best way to provide flexibility for players to
17 invest in those games.

18 **Q.** You would agree that subscription services can play a role
19 in creating the best financial opportunity for your games;
20 right?

21 **A.** No, not when -- as a multigame subscription service, no, I
22 don't.

23 **Q.** If you could, Mr. Kotick, turn again to your deposition
24 transcript, please. It's PX7035.

25 **A.** (Witness examines document.)

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1 Q. And specifically to page 135, please.

2 A. 7035, to which page?

3 Q. Page 135, line 19.

4 A. (Witness examines document.)

5 Q. Okay. Here you were asked a question (as read):

6 "QUESTION: So you mentioned your aversion is more
7 philosophical. Just to be clear, it's not based on any
8 specific analysis?

9 "ANSWER: Well, I answered your question. It's high
10 level. What is the -- my personal view, the best way to
11 create financial opportunity for games. That's not to say
12 that subscription can't play a role in those
13 opportunities. They may and can."

14 And you your testimony, Mr. Kotick, was truthful and
15 accurate when you gave it?

16 A. Yeah. So World of Warcraft is a good example. That's a
17 subscription game, we charge a monthly subscription, but it's a
18 singular game subscription. So that was a truthful answer,
19 yes.

20 Q. And when you gave your answer at your deposition, you
21 didn't include that distinction?

22 A. Well, you didn't ask that specific question. You just
23 said, "Does subscription play a role?"

24 Q. No. I asked a different question. That was just your
25 answer.

1 **A.** Well, you said (as read):

2 "So you mentioned your aversion is more
3 philosophical. Just to be clear, it's not based on any
4 specific analysis."

5 **Q.** Lots of people at the company disagree with your aversion
6 to subscription; correct?

7 **A.** I would say a lot of people do, yes.

8 **Q.** Activision hasn't made a formal decision against offering
9 its games on subscription; correct?

10 **A.** I'm not sure I understand that question.

11 **Q.** Activision hasn't taken a formal decision not to offer its
12 games on a subscription service; correct?

13 **A.** No. In fact, I think we've from time to time experimented
14 with it; but, generally speaking, I think it's not the right
15 way for us to deliver the most value to our shareholders or to
16 provide the most flexibility to our players.

17 **Q.** Let me just ask one more time. Activision hasn't made a
18 formal decision against offering its games on subscription?

19 **A.** A formal one, no, but I would say it's just not something
20 that we do have any plans to do or have ever done in a
21 multigame subscription service.

22 **Q.** Activision would evaluate an opportunity to offer its
23 consent on a subscription service; right?

24 **A.** Yeah, we would be -- yeah, that would be the responsible
25 thing to evaluate.

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1 Q. And Activision, as you mentioned earlier, has made
2 judgments to support these services before; right?

3 A. Mainly they're in experiments or for a promotional purpose
4 or in the service of trying to have a more expansive
5 opportunity with whomever the -- the other party was. But,
6 generally speaking, we don't believe that -- I don't believe
7 and the management doesn't believe that a multigame
8 subscription service for games is the best way to enable
9 players to make their investments or to provide the superior
10 shareholder returns that we have for 30 years.

11 Q. Activision hasn't decided against putting its content on
12 Sony subscription service; right?

13 A. Yes, we have.

14 Q. If you could turn again to your deposition transcript,
15 Mr. Kotick.

16 A. (Witness examines document.)

17 Q. Just to make sure you understood my question, I asked:
18 Activision hasn't decided against putting its content on Sony
19 subscription service?

20 A. You mean in the past?

21 Q. In the past or going forward.

22 A. I would tell you sitting here today that we have no plans
23 to provide our games to the Sony multigame subscription service
24 in anything other than a test or something promotional but not
25 as a business that would generate any significant revenues.

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1 Q. Let's take a look at your transcript from your deposition
2 again, Mr. Kotick, page 131, please.

3 A. (Witness examines document.) Which tab are you referring
4 to?

5 Q. PX7035.

6 A. Which page?

7 Q. 131, please, line 24.

8 A. (Witness examines document.)

9 Q. You were asked a question here (as read):

10 "QUESTION: Has there been a formal decision never to
11 offer Activision content on Sony subscription service?

12 "ANSWER: No. As I told you, I think we offer games on
13 Sony subscription service."

14 And your testimony at your deposition, Mr. Kotick, was
15 truthful and accurate?

16 A. Yeah, and consistent with what I just shared with you.

17 Q. And, in fact, Activision has put its games on Sony
18 subscription service before?

19 A. Like I said, we've done it in a limited, either
20 experimental or promotional, basis to either see what it was
21 like or to -- as part of a bigger negotiation but, yes.

22 Q. Activision hasn't formally decided against offering its
23 content on Nintendo subscription services; right?

24 A. I wasn't aware that Nintendo had a subscription service.

25 Q. You're close to where I'm going to direct you in your

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1 deposition I think right now, to page 132, line 5.

2 **A.** 132, line 5.

3 (Witness examines document.) Okay.

4 **Q.** You were asked a question (as read):

5 **"QUESTION:** Has there been a decision never to offer
6 Activision content on Nintendo's subscription service?

7 **"ANSWER:** No."

8 And your testimony was truthful and accurate when you gave
9 it, Mr. Kotick?

10 **A.** Yes.

11 **Q.** Before making a decision, you'd evaluate the commercial
12 terms for a subscription opportunity; right?

13 **A.** Do I personally? Usually it will get elevated to me.

14 **Q.** Activision -- before making a decision, Activision would
15 evaluate the commercial terms for a subscription opportunity;
16 right?

17 **A.** Sure.

18 **Q.** You agree there could be strategic reasons for Activision
19 to offer content on a subscription service; right?

20 **A.** So for a small duration of time or for a promotional
21 purpose, but not as something that would be a sustainable
22 long-term business.

23 **Q.** There could be a greater commercial context for offering
24 Activision's games on subscription; right?

25 **A.** Could you give me an example?

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1 Q. I'm just using your words from the deposition on page 197.
2 And I apologize. From your investigational hearing. It's
3 PX7006.

4 A. Yeah. I think if -- if you're talking about if a
5 subscription opportunity is offered, would Activision consider
6 it? That's what you're asking?

7 Q. Yes. And specifically one of the strategic reasons that
8 you testified to for why Activision would consider it would be
9 a greater commercial context; correct?

10 A. So like a promotion, a marketing, some, you know, moment
11 where we might, as we have in the past, used a very old catalog
12 title for a short period of time. Those are the types of
13 things where we would consider those opportunities.

14 Q. Strategic reasons include learning about a new device;
15 correct?

16 A. Sure.

17 Q. Strategic reasons include learning about a new market
18 opportunity; right?

19 A. Yes.

20 Q. Strategic reasons include bundling software with hardware;
21 correct?

22 A. Could be, sure.

23 Q. Strategic reasons could also include sponsorships for your
24 professional gaming leagues; right?

25 A. Yes.

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1 Q. In 2020, Activision considered putting its games on
2 Game Pass when negotiating with Microsoft for their latest
3 licensing agreement; correct?

4 A. I think we considered it, yes.

5 Q. And no decision has been taken against offering Activision
6 games on Microsoft's Game Pass; right?

7 A. Yes, we made a decision not to include our games on
8 Game Pass' subscription service.

9 Q. Please turn back to PX7035 in your binder.

10 A. (Witness examines document.) Yes.

11 Q. Page 20 -- I'm sorry, page 131.

12 A. Yes.

13 Q. Here at line 17 you were asked a question (as read):

14 "QUESTION: Has there been a company decision never to
15 offer its games on Game Pass?

16 "ANSWER: There's not a specific mandate that we would
17 never do so, but thus far we haven't."

18 And your testimony was truthful and accurate, Mr. Kotick?

19 A. Yeah, and that's consistent with what I believe today.

20 Q. It's consistent with thus far you haven't; right?

21 A. Yes.

22 Q. The principal reasons for why Activision doesn't offer its
23 games on Microsoft Game Pass have been commercial; right?

24 A. I think there are probably some technical reasons also,
25 but I would say it's -- for me it's principally commercial.

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1 **Q.** If Microsoft offered Activision attractive commercial
2 terms, it's possible Activision would put its games on
3 Game Pass; right?

4 **A.** We would have to evaluate commercial terms, but I don't
5 think that there is a circumstance where a company could ever
6 offer us a commercial arrangement where that would make sense.
7 When you look at what's happened in Hollywood and you see the
8 devaluation of these businesses, I just -- I can't imagine that
9 there would be any company that would be willing to make the
10 type of commercial commitment that would be required to avoid
11 the destruction of value.

12 **Q.** Before flipping back to your investigational hearing
13 transcript, I'll ask my specific question one more time.

14 If Microsoft offered Activision attractive commercial
15 terms, it's possible Activision would put its games on
16 Game Pass; right?

17 **A.** Like I said, it's possible, but I can't imagine anyone
18 ever offering the kind of commercial terms that we would
19 require. It just wouldn't be likely.

20 **THE COURT:** Can I ask you? You know it's Microsoft's
21 express purpose to put Activision content on its Game Pass if
22 the merger goes forward. You knew that when you agreed to the
23 merger, so why did you agree to that if you think it doesn't
24 make commercial sense?

25 **THE WITNESS:** Well, I -- I can have a philosophical

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1 disagreement with the way that Microsoft approaches its
2 business, but the premium that they offered to the company's
3 shareholders was the sole consideration that I needed to make
4 in determining to sell the company. I don't agree with the
5 idea of a multigame subscription service as a business
6 proposition for games going forward, but we can agree to
7 disagree on that.

8 **THE COURT:** Thank you.

9 **BY MS. CIRINCIONE:**

10 **Q.** Activision hasn't taken a formal decision against putting
11 its games on Nvidia's GeForce NOW cloud streaming service;
12 correct?

13 **A.** I can't say we've taken a formal decision. We tried it in
14 the beta test, and then we took the games off after the beta
15 test.

16 **Q.** Can you look at PX7035, page 132, please?

17 **A.** (Witness examines document.) Okay. Which page?

18 **Q.** Page 132, please, line 9. You were asked a question here
19 (as read):

20 **"QUESTION:** Has there been a decision at the company never
21 to put Activision's content on GeForce NOW?

22 **"ANSWER:** Never? No, but I don't -- I don't think we
23 support it now."

24 And your testimony was truthful and accurate, Mr. Kotick?

25 **A.** Yes.

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1 **Q.** And, in fact, Activision's games have been on Nvidia's
2 GeForce NOW; correct?

3 **A.** Yeah. Like I said, we put it on in their beta test; but
4 then when they launched the service commercially, we removed
5 our titles.

6 **Q.** Okay. I want to take a look at PX2133, please. And we'll
7 be careful here because parts of this have been marked as
8 confidential, but I don't think we need to read out loud the
9 parts that are.

10 **A.** Okay.

11 **Q.** This is an e-mail from Activision's CFO Armin Zerza sent
12 to you on February 7th, 2020. Its titled "GeForce NOW Update";
13 correct?

14 **A.** Yes, but I think at the time Armin was the chief
15 commercial officer not the chief financial officer.

16 **Q.** Okay.

17 **MS. CIRINCIONE:** Your Honor, I'd like to move to admit
18 PX2133.

19 **THE COURT:** Admitted.

20 (Trial Exhibit 2133 received in evidence.)

21 **MS. CIRINCIONE:** Thank you.

22 **BY MS. CIRINCIONE:**

23 **Q.** Mr. Kotick, here where the e-mail in the subject line
24 references "GFN," that means Nvidia's GeForce NOW; correct?

25 **A.** Yes.

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1 Q. Mr. Zerza's e-mail to you includes talking points for your
2 call with Jensen the following day; right?

3 A. That's what it says.

4 Q. Jensen is Jensen Huang, Nvidia's CEO; right?

5 A. Yes.

6 Q. The first of your talking points indicates that both
7 Activision and Nvidia have appreciated their long-standing
8 partnership; correct?

9 A. These are the proposed talking points from Armin, our
10 chief commercial officer, yes.

11 Q. And talking point one indicates that both Activision and
12 Nvidia have appreciated their historical partnership; right?

13 A. That's what it says.

14 Q. Your second point talking point states that you instructed
15 your team that Activision requires a commercial deal to have
16 its content support commercialization of GeForce NOW; right?

17 A. That's what it says.

18 Q. And here is where we shouldn't read anything out loud,
19 Mr. Kotick, but your fourth talking point includes principles
20 of a potential commercial arrangement to put Activision's
21 contents back on GeForce NOW; correct?

22 A. That's what it says.

23 Q. And that's what you said also when you testified at your
24 investigational hearing; correct?

25 A. I think so.

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1 Q. And these terms in talking point four were reasonable;
2 right?

3 A. They might have been reasonable, but they weren't talking
4 points that I actually ever used. They were just suggested,
5 but I didn't use them.

6 Q. These were talking points that Armin Zerza sent to you for
7 the call that you would have with Jensen Huang the following
8 day; correct?

9 A. Yes.

10 Q. And I don't know if you answered my question specifically.
11 If you did, you can let me know. But these terms in talking
12 point four were reasonable; right?

13 A. I think in Armin's mind they were considered reasonable.

14 Q. If you look at PX7006 on page 175, please, line 2 you were
15 asked --

16 A. One second. 7006.

17 (Witness examines document.) Okay.

18 Q. "Were the terms" --

19 A. I apologize. Which page?

20 Q. I'm sorry. At page 175, line 2, please.

21 A. (Witness examines document.)

22 Q. You were asked (as read):

23 **"QUESTION:** Were the terms -- let me be clear. I'm going
24 back now to what we were discussing before. So not the
25 question I just asked on subscription, but the

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1 conversation we were just having about cloud streaming.

2 "Were the terms that are listed in Mr. Zerza's
3 talking points for you for your call with Nvidia, are
4 those economic terms unreasonable?

5 **"ANSWER:** No, I don't think they're unreasonable."

6 And you testified truthfully and accurately at your
7 investigational hearing, Mr. Kotick?

8 **A.** Yeah. That's not inconsistent with what I just said.

9 **Q.** You're not aware of Activision being dissatisfied with the
10 technical capability of the GeForce NOW service; correct?

11 **A.** I don't really think -- I don't really know that we were
12 dissatisfied with it. I just think that it was not an
13 opportunity we thought made sense.

14 **Q.** The talking points that Armin Zerza prepared for your
15 discussion with Nvidia don't mention at all being dissatisfied
16 with the quality of Activision's games while being streamed on
17 GeForce NOW; right?

18 **A.** Should I go back to them?

19 **Q.** You can if you need to.

20 **A.** Can you tell me where they are?

21 **Q.** It's PX2133.

22 **A.** (Witness examines document.) I don't see anything that
23 says we were dissatisfied with the -- how did you phrase it?

24 **Q.** The quality of Activision games while being streamed on
25 GeForce NOW.

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1 **A.** Yeah, that was not in these talking points, no.

2 **Q.** You testified earlier about the King division. Prior to
3 2016, Activision didn't have any mobile games; right?

4 **A.** We had put games on the iPhone, like Guitar Hero, so we
5 had some mobile games.

6 **Q.** It was in 2016 that Activision bought King, the maker of
7 Candy Crush; right?

8 **A.** That's correct.

9 **Q.** Outside of King, Activision doesn't have a well-developed
10 capability to make mobile games; correct?

11 **A.** Last year it's improved dramatically, but King really --
12 like, they're an exceptional group of people that has the
13 well-developed expertise for mobile. We've been actually able
14 to take King resources and King talent over the last year and
15 add them to the Blizzard business and the Activision business.
16 And it's still hard to get access to that -- the very best
17 quality mobile talent, but King has that as an assembled
18 workforce, yes.

19 **Q.** When you testified at your investigational hearing, which
20 was in September of 2022, you testified that outside of King,
21 Activision doesn't have a well-developed capability to make
22 mobile games; is that correct?

23 **A.** Yeah. Like I said, King is that real assembled workforce
24 of capability for mobile, but we're continuously trying to get
25 mobile talent for each one of the other divisions.

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1 **Q.** September '22 -- 2022 was eight months after Microsoft
2 agreed to buy Activision; correct?

3 **A.** Eight or nine. Yeah, eight, nine months. I think it was
4 January that we announced it.

5 **Q.** We talked about outside of King, but even King is not
6 focused on making new games; right?

7 **A.** King's main focus has really been optimizing Candy Crush.
8 They've -- they've tried to make other new games, but they
9 haven't really been successful.

10 **Q.** King is focused on making content for its games that
11 already exist, not new IP; correct?

12 **A.** Yeah. Generally they haven't been successful with new IP.
13 They've been much more focused on the Candy Crush franchise.

14 **Q.** I'd like to show you another document, Mr. Kotick. It's
15 marked as PX2282. This is also a document that's been
16 partially marked as confidential, so we'll be careful not to
17 read the parts we're not supposed to.

18 This is an e-mail sent to Daniel Alegre, who is president
19 of Activision Blizzard, and it was sent on July 18th, 2020;
20 correct?

21 **A.** Yes.

22 **MS. CIRINCIONE:** Your Honor, I move to admit PX2282
23 into evidence, please.

24 **THE COURT:** Admitted.

25 (Trial Exhibit 2282 received in evidence.)

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1 **MS. CIRINCIONE:** Thank you.

2 **BY MS. CIRINCIONE:**

3 **Q.** The subject of your e-mail to Mr. Alegre is about
4 Activision's long-range plan; right?

5 **A.** Yes.

6 **Q.** And Activision's long-range plan spans for the following
7 three years; correct?

8 **A.** Correct.

9 **Q.** I'd like you to read just to yourself, Mr. Kotick, not out
10 loud, that first paragraph starting with "As" and ending with
11 "purposes."

12 **A.** (Witness examines document.) Yes.

13 **Q.** You wrote that sentence, Mr. Kotick?

14 **A.** I did.

15 **Q.** I'd like you to read the second paragraph starting with
16 "They" and ending with "far."

17 **A.** (Witness examines document.) Okay.

18 **Q.** You wrote that sentence as well?

19 **A.** Yes.

20 **Q.** Activision launched its first mobile version of Call of
21 Duty called Call of Duty Mobile in October 2019; right?

22 **A.** I can't be certain, but that sounds about right.

23 **Q.** But Activision didn't make Call of Duty Mobile; right?

24 **A.** That version was largely made by Tencent, that's our
25 partner in China and the world's largest video game company.

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1 **Q.** The reason Tencent made Call of Duty Mobile for Activision
2 was because Activision couldn't make that game on its own;
3 right?

4 **A.** It would have been very difficult for us to make that game
5 on our own.

6 **Q.** The reason Tencent made Call of Duty Mobile for Activision
7 was because Activision couldn't make that game on its own?

8 **A.** Like I said, it would have been very difficult for us to
9 have made that game, especially in that timeframe, on our own.

10 **Q.** I want to flip to your investigational hearing transcript,
11 Mr. Kotick, because this language is very important. It's
12 PX7006, page 73. It's starting at line 8.

13 **A.** Page 73?

14 **Q.** Yes.

15 **A.** (Witness examines document.) Okay.

16 **Q.** Let me get there myself. Just one second.

17 (Pause in proceedings.)

18 **BY MS. CIRINCIONE:**

19 **Q.** You were asked a question at line 2 (as read):

20 **"QUESTION:** Do you have any other partnerships or joint
21 ventures that are similar in nature, in other words, where
22 Activision works with a third party to develop a game
23 because Activision's lacking the technical capability to
24 do so?

25 **"ANSWER:** Yes. So Tencent, who they're of the world's

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1 largest -- excuse me -- world's biggest game company, they
2 made Call of Duty Mobile for us, and we couldn't make that
3 game on our own at the time so we entered a joint venture.
4 We worked with them."

5 Your testimony was truthful and accurate at the time,
6 Mr. Kotick?

7 **A.** Yes.

8 **Q.** The Diablo franchise also has a mobile game that was
9 released relatively recently; right?

10 **A.** Yes. Probably a little more than a year ago.

11 **Q.** It's called Diablo Immortal; right?

12 **A.** Yes.

13 **Q.** Activision didn't make that game either; right?

14 **A.** It was principally made by another Chinese company, also
15 one of the largest game companies in the world, called NetEase.

16 **Q.** Activision evaluates how best to optimize its content for
17 every device; right?

18 **A.** Yeah, generally speaking.

19 **Q.** "Optimize" means take the steps and do the work needed to
20 ensure a good player experience on a particular device; right?

21 **A.** Yeah.

22 **Q.** The Switch is Nintendo's current gaming device; right?

23 **A.** It is.

24 **Q.** If I wanted to know how to optimize Call of Duty for the
25 Switch, I'd have to ask Activision's game teams; right?

1 **A.** Sure.

2 **Q.** That's because each publisher knows the process to
3 optimize its own titles; right?

4 **A.** I'd say each developer because a publisher might be more
5 of a commercial way to think about it.

6 **Q.** That's fair.

7 For example, you wouldn't know how to optimize Minecraft
8 for the Switch; right?

9 **A.** Would I know the details of how to do it? No. Could I at
10 a high level sort of think about the game and evaluate how you
11 might do it? At a high level, but I wouldn't know from a
12 detailed perspective. It's not our game.

13 **Q.** Likewise, Microsoft wouldn't know what it takes to
14 optimize Call of Duty for the Switch because they don't make
15 Call of Duty; right?

16 **A.** Similarly, from a high level, they could evaluate what
17 would be required or they could envision a game that they might
18 make for a Call of Duty for the Switch.

19 **Q.** Two different games from two different franchises wouldn't
20 have the same technical considerations when you're thinking
21 about optimizing; correct?

22 **A.** I'm not sure I really understand the question.

23 **Q.** Just because Microsoft makes other games for the Switch
24 doesn't mean that they know what it takes to make Call of Duty
25 for the Switch?

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1 **A.** Here's what I would say, is if you think about Call of
2 Duty as armed conflict through history, if you're a game team
3 at Microsoft, you could reasonably conceive of what a Call of
4 Duty on the Switch would be or would look like. It's not like
5 there's anything proprietary about military conflict.

6 **Q.** I want to look at some of your language at PX7035 again at
7 page 92.

8 You were asked a question at line 11 (as read):

9 **"QUESTION:** Okay. Can you explain to me, Mr. Kotick, from
10 a technical perspective, how to optimize the title
11 Minecraft for the Nintendo Switch?

12 **"ANSWER:** No, I couldn't.

13 **"QUESTION:** Why not?

14 **"ANSWER:** Well, I don't make Minecraft.

15 **"QUESTION:** Who makes Minecraft?

16 **"ANSWER:** Microsoft.

17 **"QUESTION:** Are you saying that if I want to know the
18 process that it would take to optimize Minecraft with a
19 Nintendo Switch, I'd have to ask Microsoft?

20 **"ANSWER:** Yes.

21 **"QUESTION:** Because it's their game?

22 **"ANSWER:** Yes."

23 **A.** Right, but the key here is that you're saying from a
24 technical perspective. What I was saying is that from a
25 high-level perspective, you could think about the franchise and

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1 envision what that -- what would be possible at a detailed
2 technical level to actually create a product, create a plan.
3 You would need to be the owner of the game to be able to do
4 that.

5 **Q.** To create a product or to create a plan, meaning to be
6 able to analyze costs, for example?

7 **A.** I think, you know, just the detailed specificity of what
8 that game would be, you're probably going to need to be the
9 owner or developer of that to do that; but from a high level,
10 you could come up with ideas.

11 **Q.** Call of Duty for the Switch would not be the same as Call
12 of Duty on the Xbox X-S series or PlayStation 5; correct?

13 **A.** Correct.

14 **Q.** That's because the Switch has unique characteristics;
15 right?

16 **A.** Yes.

17 **Q.** And it has unique hardware; right?

18 **A.** It does.

19 **Q.** And it has different processors; right?

20 **A.** Yes.

21 **Q.** And different capabilities; right?

22 **A.** Yeah. It has -- it's a console but also has portability.
23 It's very well differentiated.

24 **Q.** Microsoft recently signed an agreement that purports to
25 offer a future Call of Duty on the Switch; right?

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1 **A.** That's what I'm told.

2 **Q.** You've never seen Microsoft's agreement with Nintendo;
3 right?

4 **A.** No.

5 **Q.** You learned about it after reading about it in the news;
6 right?

7 **A.** I did.

8 **Q.** Activision's game teams weren't involved in the agreement
9 in any way; right?

10 **A.** No.

11 **Q.** Activision hasn't shared any information with Microsoft
12 about optimization of any Activision titles for the Switch;
13 right?

14 **A.** No.

15 **Q.** It's your understanding that the Microsoft Nintendo
16 agreement also purports to bring a future Call of Duty game to
17 a future Nintendo console; right?

18 **A.** I believe so.

19 **Q.** Even without Microsoft buying Activision, it's likely that
20 Activision would on its own make Call of Duty available for
21 Nintendo's future console; right?

22 **A.** I think we would consider it once we had the specs, but we
23 don't have any present plan to do so.

24 **Q.** It's likely that Activision on its own would make a Call
25 of Duty game for Nintendo's future generation console; right?

1 **A.** Like I said, I think once we have -- get the detailed
2 specifications. We missed out on the opportunity on the --
3 this past generation of Switch, so I would like to think that
4 we would be able to do that, but we'd have to wait until we got
5 the technical specifications. But we don't have any present
6 plan to do so.

7 **Q.** Can we again look at PX7035 of your transcript, page 123,
8 please?

9 **A.** (Witness examines document.)

10 **Q.** At line 9 you were asked a question (as read):

11 **"QUESTION:** Has Activision decided that it won't offer
12 Call of Duty on a future Nintendo console?

13 **"ANSWER:** No. I actually think we will likely make a Call
14 of Duty for a new Nintendo console.

15 **"QUESTION:** There are plans to make a Call of Duty game
16 for a next generation Nintendo console?

17 **"ANSWER:** I can't tell you that there are specific plans,
18 but I would say it would -- it's probably something we'll
19 consider.

20 **"QUESTION:** Something that Activision will consider?

21 **"ANSWER:** Yes."

22 **A.** Yeah. That's very consistent with what I just shared with
23 you, but we don't have any present plan to do so.

24 **THE COURT:** Well, if the merger doesn't go through --
25 you said that you made a mistake with respect to the Switch

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1 earlier; right? You're not going to make that mistake again;
2 right? You would -- I mean, what would be a reason that you
3 wouldn't do so?

4 **THE WITNESS:** Well, if we didn't have the resources
5 and there was something else we wanted to prioritize that was
6 more important; or when we saw the new design of the device, we
7 didn't think it was appropriate for a particular title.

8 **THE COURT:** Okay. But that's never happened with an
9 Xbox or PlayStation, that when you saw the new specs, you
10 didn't think it was appropriate for the title?

11 **THE WITNESS:** I can't say that that was the case.
12 With Nintendo there's a different level of complexity
13 because --

14 **THE COURT:** Okay. Let me stop you there.
15 You would like to be able to put Call of Duty on the
16 Nintendo Switch?

17 **THE WITNESS:** I think we would consider it; and if it
18 was something that we knew we could make a great game from, we
19 would likely consider it.

20 **THE COURT:** Okay. All right. I think you move on to
21 the next topic.

22 How much longer do you have? Because we're at 10:00. I'd
23 rather finish with the witness, but I don't know how long you
24 have.

25 **MS. CIRINCIONE:** I think very little.

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(Recess taken at 10:05 a.m.)

(Proceedings resumed at 10:21 a.m.)

THE CLERK: Court is back in session.

THE COURT: You can remain seated.

All right. You may resume.

MS. CIRINCIONE: Thank you, Your Honor.

I know you said it was okay to move on to the next topic,
but there was one --

THE COURT: Sure.

MS. CIRINCIONE: -- ordinary course document I just
wanted to get in for your benefit.

THE COURT: Of course.

MS. CIRINCIONE: It's PX2421.

(Pause in proceedings.)

MS. CIRINCIONE: It's a document that's been marked
entirely as confidential except for one part actually, and I
can get to that, if that's helpful to you, Your Honor.

THE COURT: Go ahead.

BY MS. CIRINCIONE:

Q. Mr. Kotick, this is an executive briefing that your CFO
Armin Zerza sent to you on December 14th, 2022; right?

A. Yes.

Q. The executive briefing is for your call with Furukawa-San
the following day?

A. Yes.

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1 **Q.** And Furukawa-San is the head of Nintendo; right?

2 **A.** Yes, he is.

3 **MS. CIRINCIONE:** Your Honor, I move to admit PX2421
4 into the record, please.

5 **THE COURT:** Admitted.

6 (Trial Exhibit 2421 received in evidence.)

7 **MS. CIRINCIONE:** The paragraph, Your Honor, that we've
8 agreed with Defendants would not be confidential is on the last
9 page of the document PX2421-009.

10 (Pause in proceedings.)

11 **THE COURT:** The next steps?

12 **MS. CIRINCIONE:** It's a header at the top that reads
13 "Conclusion" and the next paragraph says -- the paragraph that
14 I'm referencing is "Given the closer alignment."

15 **THE COURT:** All right. That will not be under seal?

16 **MS. CIRINCIONE:** Correct, unless you obviously --
17 unless you feel like more should be open.

18 **THE COURT:** If no one wants it, then I'm okay with
19 that.

20 **BY MS. CIRINCIONE:**

21 **Q.** I think, Mr. Kotick, at the end of the executive briefing
22 on page 007, there's something called "Switch NG Exec Summary";
23 correct?

24 **A.** Yes.

25 **Q.** And on the following page 008 at the very bottom of the

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1 page there's a paragraph that starts "This," and that sheds
2 some clarity on what "NG" means; correct?

3 A. (Witness examines document.) Okay. I'm sorry. I didn't
4 hear the question.

5 Q. I just want to give the Court the benefit of understanding
6 what "NG" means so that it's clear.

7 A. Oh. I think it means next generation.

8 Q. Thank you.

9 And then on the next page where I was referencing
10 previously there's a conclusion section?

11 A. Yes.

12 Q. And the third paragraph down, do you see that?

13 A. It starts "However"?

14 Q. Yeah, it starts "Given" -- "Given."

15 A. I see, uh-huh.

16 Q. Do you see that?

17 A. I do.

18 Q. Okay. I'll read this because we can read it out loud (as
19 read):

20 "Given the closer alignment to Gen 8 platforms in
21 terms of performance and our previous offerings on
22 PS4/Xbox 1 it is reasonable to assume that we could make
23 something compelling for NG Switch as well."

24 Is that correct, Mr. Kotick?

25 A. That's what it says.

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1 **Q.** Mr. Kotick, Call of Duty Modern Warfare 2 is not the same
2 as Call of Duty War Zone; right?

3 **A.** No.

4 **Q.** Modern Warfare 2 can't be played on a phone; right?

5 **A.** It -- the console game for PS5 and Xbox Series X couldn't
6 be played on a phone, no.

7 **Q.** There isn't a Modern Warfare 2 for the phone; right?

8 **A.** Well, you'll get to the point to where a lot of that
9 content will be playable on a phone.

10 **THE COURT:** But today it's not?

11 **THE WITNESS:** No.

12 **BY MS. CIRINCIONE:**

13 **Q.** You said playing Modern Warfare 2 on a phone would be like
14 using a refrigerator for a safe; right?

15 **A.** I think so.

16 (Laughter)

17 **BY MS. CIRINCIONE:**

18 **Q.** Mr. Kotick, Microsoft agreed to buy Activision at \$95 a
19 share; right?

20 **A.** Yes.

21 **Q.** That's an extremely large premium; right?

22 **A.** It was a great premium for our shareholders.

23 **Q.** And you own approximately 4.3 million shares in
24 Activision; right?

25 **A.** I don't know exactly the number, but somewhere

1 thereabouts.

2 Q. I just did rough math, but if the deal closes, your stock
3 would then be worth approximately \$408 million; right?

4 A. With your rough math, yes.

5 MS. CIRINCIONE: I don't have anything further,
6 Your Honor. Thank you.

7 REDIRECT EXAMINATION

8 BY MS. WILKINSON:

9 Q. Let's talk about the few times that you allowed any of
10 your games to go into a content a library content subscription
11 service.

12 When you did that, did you ever allow those games to go in
13 day and date?

14 A. No, I don't believe so.

15 Q. Why is that?

16 A. In most of those experiments we were using titles that
17 were old.

18 Q. Did you have them in those subscription services for a
19 limited time period?

20 A. Yes, I believe, for the most part they were in for a
21 limited timeframe.

22 Q. Okay.

23 A. Some might have been for a longer period of time, but they
24 were all old content that wasn't really being commercialized.

25 Q. And as the CEO of the independent Activision, is it your

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1 best business judgment that today it's not in your
2 shareholders' financial interest to put Call of Duty games into
3 a subscription service day and date?

4 **A.** Yes.

5 **Q.** All right. You were talking to Her Honor about what would
6 happen when Microsoft and Xbox acquire Activision.

7 Do you believe they have a different perspective on what's
8 in the best interest of their shareholders once they own the
9 content?

10 **A.** Yes. From what I understand, they -- they think that
11 there's a greater opportunity for that type of product.

12 **Q.** Have you seen the content that they own, their first-party
13 games, and whether they do put those into their Game Pass
14 subscription day and date today?

15 **A.** I'm not sure I understand the question.

16 **Q.** So are you aware that some of Xbox's own games are in
17 Game Pass today?

18 **A.** Yes.

19 **Q.** And they are in their day and date?

20 **A.** I can't be certain, but I'll take your word for it.

21 **Q.** Okay. And PlayStation has its own subscription service;
22 correct?

23 **A.** Yes.

24 **Q.** And it has its own games in their content library
25 subscription service; right?

1 **A.** I believe so.

2 **Q.** And are you aware that Mr. Ryan has made a different
3 business judgment about whether it's appropriate to put those
4 games in day and date?

5 **A.** I was not aware of that.

6 **Q.** Okay. Do you think that your team at Activision working
7 in concert with the engineers, developers at Xbox will be able
8 to put a version of Call of Duty onto the Nintendo Switch?

9 **A.** The current Switch?

10 **Q.** Yes.

11 **A.** Yes.

12 **Q.** Okay. You believe working together they can make the
13 technical adjustments or refine the game in a way that will be
14 a good gaming experience on the Switch?

15 **A.** Yes, I think we can make a great -- a good game for the
16 Switch.

17 **Q.** On the mobile -- War Zone Mobile, you were asked about
18 other mobile games, the early ones you've developed, that were
19 not made in house by Activision Blizzard King; correct?

20 **A.** Yes.

21 **Q.** You told us earlier that you're going to be putting
22 War Zone onto the mobile phone; right?

23 **A.** That's correct.

24 **Q.** Is that game being developed in-house at Activision or by
25 another third party?

1 **A.** Internally.

2 **MS. WILKINSON:** That's all.

3 **THE COURT:** Anything further?

4 **RECROSS-EXAMINATION**

5 **BY MS. CIRINCIONE:**

6 **Q.** For the mobile game you were just -- you just responded to
7 Ms. Wilkinson's questions about that you said was going to be
8 released, when is that going to be released?

9 **A.** I think we're currently planning for the fall.

10 **Q.** Is that when it was planned to be released initially?

11 **A.** I think it was planned for earlier, but we had some
12 delays.

13 **Q.** Thank you.

14 **MS. CIRINCIONE:** No further questions.

15 **THE COURT:** All right. That ends your testimony. You
16 are excused.

17 **THE WITNESS:** Thank you very much.

18 (Witness excused.)

19 **THE COURT:** I don't know who's going next, so who's
20 our next witness?

21 **MR. KILARU:** Your Honor, I think we were going to
22 resume the testimony of Dr. Bailey.

23 **THE COURT:** Great.

24 (Pause in proceedings.)

25 \\

BAILEY - DIRECT / KILARU

ELIZABETH MEEKER BAILEY,

called as a witness for the Defendant, having been previously
duly sworn, testified further as follows:

DIRECT EXAMINATION (resumed)

BY MR. KILARU:

Q. Welcome back, Dr. Bailey.

A. Good morning.

Q. Thanks for being flexible.

When we left off yesterday, you were discussing Nintendo
and PC's competitive success without Call of Duty. Did you
form an opinion as to whether those products are properly
excluded from the product market in this case for hardware?

A. Nintendo and PC? I did.

Q. Now, did you hear during Ms. Wilkinson's cross of Dr. Lee
yesterday that Sony has represented to regulators that the
Nintendo Switch is a principal rival?

A. I did.

Q. Did you do any economic analysis to try to evaluate
whether that's the case?

A. Yes, I did.

Q. I'll ask you to turn to Slide 23.

MR. KILARU: And, Roger, if we could go to Slide 23,
that would be great.

But, Ms. Means, I think this one's in camera so...

\\

1 **BY MR. KILARU:**

2 **Q.** Doctor, could you explain the analysis that you did
3 looking at the Nintendo Switch?

4 **A.** Sure. So we talked yesterday about telemetry data, and
5 this chart that's on the screen, the green is Xbox telemetry --
6 is based on Xbox telemetry data and the blue is based on
7 PlayStation telemetry data. And so the -- the question at hand
8 is whether the Nintendo Switch is an important rival, a
9 competitive constraint, on Xbox and on PlayStation, and I was
10 able to look at that question by considering what happened when
11 the Nintendo Switch entered in 2017.

12 **Q.** And how did you do that analysis?

13 **A.** Sure. So in economics we have a technique that's called
14 difference-in-difference, and the reason why I use that
15 technique is gaming, there are seasonal features to it, so I
16 wanted to be as sure as I could that the effect that I was
17 picking up was the effect of the Nintendo Switch entering on
18 Xbox and PlayStation, not the ordinary fluctuations that might
19 come from seasonality.

20 **Q.** So how did you do that?

21 **A.** So what I looked at is if Nintendo Switch mattered to
22 competition for -- on Xbox and PlayStation, then when the
23 Nintendo Switch entered, what I would expect to see is an
24 effect on gamer behavior.

25 And so this chart that's up on the screen, there were two

1 ways in which I looked at gamer behavior. One was the change
2 in the number of active gamers, the number of gamers on the --
3 on the console and the Xbox console and the PC -- and the
4 PlayStation console.

5 And then the other way that I looked at a change in gamer
6 behavior was I looked at whether there was a change in
7 game-time hours; how -- even those people who continued to
8 play, did they change the number of hours that they were
9 gaming.

10 And this chart shows the result of that study.

11 **Q.** Without talking about the numbers, did you see a rise or a
12 fall?

13 **A.** So I saw a fall. And so what's on the left-hand side is
14 you can see the decline in the number -- the percentage decline
15 in the number of gamers on the Xbox console; and then next to
16 it the blue line, the blue bar, the decline in the number of
17 gamers on the PC -- on the PlayStation console.

18 And then the right-hand side of the chart you can see for
19 those gamers that -- that stayed, how the game-time hours
20 changed. And you can see a decline there both on the Xbox and
21 on the PlayStation console.

22 **Q.** And what does this tell you about substitution,
23 Dr. Bailey?

24 **A.** Well, this is what I would expect to see if there were --
25 if there was substitution. If gamers on Xbox and PlayStation

1 considered the Nintendo Switch a substitute, this is what I
2 would expect to see and that's what I found.

3 **THE COURT:** Can I ask you? I think, if I recall from
4 your report, you looked at data for ten weeks?

5 **THE WITNESS:** Yes, that's correct.

6 **THE COURT:** So did that same decline then exist past
7 the ten weeks? In other words, one of the arguments is, is
8 that the Switch performance is not as good. So one might think
9 that initially consumers would buy it; and then if they
10 thought, "Oh, not as good," then they'd go back to their Xbox
11 or PlayStation. So what did you see past the ten weeks?

12 **THE WITNESS:** So the -- so I didn't look past ten
13 weeks, and here is why: It's because there's a lot of things
14 that happen in this world, and I wanted to be able to isolate
15 the effect.

16 And so the longer we go out, the more events that start to
17 come in and the harder it is to start to control for what's
18 happening. So that's why I focused right on that period.

19 **THE COURT:** So do you -- all right.

20 So the opinion you draw is that at least when it came out,
21 consumers played on it and purchased it?

22 **THE WITNESS:** Not only did they play on it and
23 purchase it, but more specifically Xbox gamers and PlayStation
24 gamers switched. They switched entirely their gaming behavior
25 and they switched in part their gaming behavior.

1 **THE COURT:** No pun intended.

2 **THE WITNESS:** Yes.

3 (Laughter)

4 **THE COURT:** Okay. For at least that ten-week period?

5 **THE WITNESS:** For at least that ten-week period. And
6 as an economist, it's informative to substitution because, you
7 know, you could imagine it was a whole different set of gamers,
8 that it wasn't pulling from PlayStation or from Xbox, and
9 that's not what this analysis shows. It shows that kind of
10 substitution.

11 **BY MR. KILARU:**

12 **Q.** Doctor, did you do any other analysis of comparability
13 between the Switch and the other platforms we've talked about?

14 **A.** I did, and it's complementary to this analysis, yes.

15 **MR. KILARU:** Can we go to the next slide? And can we
16 turn the public view back on -- or published rather?

17 (Pause in proceedings.)

18 **BY MR. KILARU:**

19 **Q.** What do we see here, Doctor?

20 **A.** So what I have here is the -- a collection of the popular
21 games that are played on Xbox, and those are all the green
22 checks on this chart. And what I'm showing is that those same
23 set of popular games are also available on Nintendo.

24 **Q.** And are some of these games available to be played between
25 folks on Nintendo and folks on the Xbox?

1 **A.** Cross platforms play, yes. Yes.

2 **Q.** Did you do a similar analysis for the PlayStation?

3 **A.** I did. I did the same kind of analysis for PlayStation
4 games; and many of the popular PlayStation games, those are the
5 blue checks, are also available for play on Nintendo.

6 **Q.** And what does all that tell you about the product market?

7 **A.** Well, the -- taken holistically, the collection of these
8 economic studies plus the testimony and the documents in the
9 record that I reviewed, these are all consistent with Nintendo
10 being considered a rival by Xbox and by PlayStation.

11 **Q.** We've heard some testimony that the PlayStation 5 and the
12 Switch are sold at different price points. Does that change
13 your analysis?

14 **A.** No, because the -- certainly with respect to the
15 PlayStation S and the Switch, they are -- they're priced the
16 same at 299.99.

17 **Q.** I think you said "PlayStation." Did you mean Xbox?

18 **A.** Oh, I apologize. The Nintendo. I'm looking at
19 PlayStation.

20 **Q.** Fair enough.

21 And, Doctor, what does it do, from a share perspective, if
22 Nintendo is included in the global console market?

23 **A.** Sure. So what I'm showing here are three ways to measure
24 console shares by revenue, by units, or by installed base; and
25 no matter which metric we use, Xbox is the third place console.

1 Q. And has that generally been true for the last five years?

2 A. Yes. That's generally true, yes.

3 Q. Were you here yesterday when Mr. Ryan testified that PC is
4 a very direct competitor to the PlayStation?

5 A. I did hear that testimony.

6 Q. Were you able to look at telemetry data to determine
7 whether there's similar substitution on the PC?

8 A. So I testified yesterday that I asked for telemetry data,
9 but telemetry data wasn't available in a systematic or robust
10 way for me to look at it for PC so I didn't have that
11 available.

12 Q. Did you try to do any analysis of comparability between
13 PCs and consoles?

14 A. I did.

15 Q. What did you find?

16 A. Well, what this -- that's what's on this chart here. What
17 I'm showing here in my report, I have many more games but here
18 these are the top 15 games that are played on Xbox and on
19 PlayStation, and you can see all of those top 15 games are also
20 available for play on PC.

21 Q. And similar question to before. Can some of these games
22 be played between PCs and consoles?

23 A. Yes. There is cross-platform play, yes.

24 Q. Were you able to come to an opinion as to whether Nintendo
25 and PC can properly be excluded from a hardware market in this

1 case?

2 **A.** I was. Based on the economic analyses that I have done,
3 the data-driven ones as well as my review of the testimony and
4 the documents, the Nintendo and PC are properly included in
5 that relevant market. That Dr. Lee's market is too narrow.

6 **Q.** Just a few more topics, Dr. Bailey.

7 **THE COURT:** Well, before can you just sort of expand
8 on that? So why? Why does the fact that they're available on
9 both PC and -- same games, you can play the same games on both,
10 for some games you can even cross-play. Why -- what is it,
11 from the economic point of view, that means they should be
12 considered in the same market?

13 **THE WITNESS:** Sure. So when we looked at what
14 happened when the Switch entered, from a data-driven economic
15 perspective, which is that's my heart and soul, that that's the
16 kind of data that tells you real-world behavior. You don't
17 have to guess about what's going on or think about a model of
18 what's going on. You can look at the data and the data tells
19 you what are those gamers doing.

20 And that's what I see when I look at this event of what
21 happened to the Xbox gamers and the PlayStation gamers when the
22 Switch entered. I see they -- again, pardon the pun -- they
23 switched.

24 **THE COURT:** And the fact that they had the same games,
25 that just enables them to switch? If they didn't -- couldn't

1 play the same games, then you would think, well, it might be a
2 different market because you can't -- you'd have to play
3 completely different games; but because they can play in the
4 same games, to you it seems like an available -- an appropriate
5 substitute?

6 **THE WITNESS:** Yeah. It's additive for me. So it may
7 be that different games are substitutes because, you know, you
8 have your time and what you're really substituting is how you
9 spend your time, but it's -- it is additive and more robust for
10 me that it's, in fact, the same games so that you could
11 substitute to a different device and play different games or
12 play the same.

13 **THE COURT:** Since you didn't have the data for the PC
14 and you didn't -- you heard Professor Lee say, well, the PC,
15 the price difference is greater, what do you say to that?

16 **THE WITNESS:** Um --

17 **THE COURT:** In other words, I'd have to spend \$1,500,
18 I believe he testified, to buy a PC.

19 **THE WITNESS:** Yeah. So I was here yesterday and I
20 heard that testimony. I guess what I -- on my review of -- of
21 the documents and the testimony is that many gamers multi-home.
22 They already have a PC. And in my report I talk about it, and
23 I'm not going to remember exactly what footnote sitting here,
24 but I talk about the percentage of gamers that multi-home with
25 PC, and it's a large percentage.

1 And so that construct of having to go out and buy a PC, I
2 mean, maybe some do, but more likely because you -- many of
3 them already multi-home with a PC, that substitution is made
4 easier.

5 **THE COURT:** Okay.

6 **BY MR. KILARU:**

7 **Q.** Doctor, there's -- are you aware that Dr. Lee also defines
8 a product market of multigame library subscription services?

9 **A.** Yes, I am.

10 **Q.** And did you hear during cross-examination that he said he
11 looked primarily at documents because there wasn't quite as
12 much data here?

13 **A.** Yes, I did hear him.

14 **Q.** Did you try to do any analysis based on data?

15 **A.** I did.

16 **MR. KILARU:** This next slide is in camera, Ms. Means.
17 Thank you.

18 **BY MR. KILARU:**

19 **Q.** Dr. Bailey, what did you look at in trying to assess
20 whether subscription and buy-to-play games are in different
21 markets?

22 **A.** Sure. So this goes back to the telemetry data. I had
23 available to me Xbox telemetry data, and what I was able to
24 look at to assess that question of are subscription services
25 and buy-to-play games, do they compete, are they two ways to

1 basically monetize the same game, and so what I was able to
2 look at was I took the set of games that were added to
3 Game Pass and I asked: What happened to their buy-to-play
4 sales when those games were added to Game Pass?

5 Because if they were substitutes, I would expect the
6 buy-to-play sales to decline. And I know it's not on the
7 screen, so if you look at the top horizontal row of that slide,
8 that percentage in black bold, that's what my analysis showed.
9 And maybe too much in the weeds, but I did the same kind of
10 analysis using this economic tool of difference-in-difference
11 so you can control for that -- to the extent there's any
12 seasonality, you're able to control for that.

13 **Q.** Was that the only thing you looked at?

14 **A.** It's not the only thing I looked at. I could look at the
15 reverse of that. So what happened when games were removed from
16 Game Pass? What happened to those buy-to-play sales when that
17 game was removed from Game Pass.

18 And what you can see in the second row, that percentage
19 that's in black and in bold, is that's the percentage increase
20 in buy-to-play sales on average of the games when they get
21 removed from Game Pass. So that same game, those buy-to-play
22 sales increased by that percentage that's there.

23 **Q.** And what does this analysis tell you about
24 substitutability?

25 **A.** From an economic perspective, this is strong, robust

1 evidence of substitution, gamer substitution, between
2 subscription services and buy-to-play.

3 **Q.** Last topic on markets, Dr. Bailey, is cloud gaming.

4 Similar question. You're aware that Dr. Lee defines a
5 product market of cloud gaming services? I may not get the
6 words exactly right.

7 **A.** Yes, I am.

8 **Q.** And here too are you able to try to look at some data to
9 determine what we can assess about whether this is a separate
10 market or not?

11 **A.** Yes. I was able to look at that.

12 **MR. KILARU:** Next slide is not in camera, Ms. Means.
13 Thank you.

14 **BY MR. KILARU:**

15 **Q.** What did you look at and what did you find, Dr. Bailey?

16 **A.** So what's here is also telemetry data from Xbox, and that
17 green line shows you the monthly total gaming hours on console
18 between 2019 and the start of 2023.

19 And just in case there's a question what's the big blip in
20 the middle, that's COVID. That's everyone staying home and
21 playing games.

22 And then the orange line, that's cloud gaming hours.

23 **Q.** And what does this data tell you about how and why people
24 are using cloud gaming on Xbox?

25 **A.** Sure. So I -- I found this informative.

1 Is this public?

2 **Q.** Yes, it is.

3 **A.** Okay.

4 So this was informative to me because cloud gaming hours
5 is less than 1 percent of console gaming hours. So it's very,
6 very small.

7 But in addition to just its small nature, I was able to
8 look at how -- how cloud gaming is used by gamers. So on Xbox
9 in order to access the cloud gaming, it's through the Game Pass
10 Ultimate subscription there's a feature for cloud gaming, and I
11 could look to see how those gamers of Game Pass Ultimate were
12 using cloud gaming.

13 And what I found was that of those Game Pass Ultimate
14 gamers, a very small fraction of them access the cloud gaming
15 feature. Their proportion of game time hours through cloud
16 gaming are even smaller. When they access that cloud gaming
17 feature, the overwhelming majority of them are accessing it at
18 least once through a console, and that in and of itself tells
19 me there's some substitution there between console and cloud
20 because they are accessing the cloud through the console.

21 And then the last thing that I was able to look at through
22 the telemetry data was: Once they were on the cloud, how were
23 they using it? And the data is consistent with those gamers
24 when they use the cloud, using the cloud to try out a game,
25 it's not sustained game playing; it is largely playing one game

1 they never played before and not playing it ever again other
2 than that one day that they tried it out.

3 **THE COURT:** So I think Ms. Bond testified that at
4 least that what she was seeing was that gamers would use the
5 cloud to play the game while they were downloading. Say they
6 had bought the game and while they were downloading it, they
7 would use it. Is the data that you saw consistent with that?

8 **THE WITNESS:** It would be exactly consistent with
9 that.

10 **BY MR. KILARU:**

11 **Q.** Dr. Bailey, did you hear the testimony of Mr. Zimring from
12 Google about their cloud service?

13 **A.** I did.

14 **Q.** And what did you take away from that as an economist?

15 **A.** Well, as an economist, what I took away was the
16 competitive constraint he was facing was from console and PC as
17 well.

18 **Q.** So what does that tell you about whether cloud gaming is a
19 separate product market?

20 **A.** Well, when a product faces strong competition from another
21 product, typically we think about those products in the same
22 relevant market.

23 **Q.** Just one final topic, Doctor.

24 We've heard throughout the trial that Call of Duty is
25 available on Xbox, PC, PlayStation, and mobile. Is that

1 consistent with your understanding?

2 **A.** Yes, it is.

3 **Q.** Now, are you aware of the contract that Microsoft has
4 signed to bring Call of Duty to the Nintendo platforms if the
5 transaction closes?

6 **A.** Yes, I am.

7 **Q.** And the five other contracts with cloud streaming
8 providers?

9 **A.** Yes.

10 **Q.** Do you have an understanding of whether those contracts
11 are contingent on the deal going through as to Call of Duty?

12 **A.** I'm not a lawyer, but that's -- that's how I interpret
13 them. Yes, it is contingent.

14 **Q.** So as an economist, what does that signify to you about
15 the effects of the transaction on output?

16 **A.** Well, it -- it means the transaction is output expanding,
17 it expands the availability of the Activision video game
18 content to more gamers. It brings more games to more gamers.

19 **MR. KILARU:** Your Honor, that's all we have for now.
20 Thanks.

21 **MR. WEINGARTEN:** Your Honor, my colleague Mr. Alex
22 Ansaldo will be conducting the cross-examination.

23 **MR. ANSALDO:** Good morning, Your Honor.

24 May we approach with a witness binder?

25 **THE COURT:** You may.

BAILEY - CROSS / ANSALDO

(Pause in proceedings.)

CROSS-EXAMINATION

BY MR. ANSALDO:

Q. Good morning, Dr. Bailey.

A. Good morning.

Q. I just wanted to touch on the last point you were raising with respect to the conditional contracts that you view as an output-enhancing feature of the merger.

If any merging firm committed to cutting prices conditioned on the merger being approved, would you consider that a merger-specific efficiency?

A. Gosh, I'd certainly consider it. I mean, that's very broad. I would have to consider -- I would consider it.

Q. Turning back to Demonstrative 29, which you were just discussing, this is your demonstrative.

(Pause in proceedings.)

BY MR. ANSALDO:

Q. That's based on -- solely on Xbox data; right?

A. It's Xbox telemetry data.

Q. You said this demonstrates people are using cloud on console; is that right?

A. Xbox gamers.

Q. Xbox gamers are using Xbox cloud on Xbox consoles?

A. The majority of the Xbox Game Pass Ultimate gamers that access cloud, the majority of them at least once are accessing

1 cloud through a console -- through their console.

2 **Q.** So they're using them both at the same time; right?

3 **A.** They're using the console to access cloud. I guess if
4 you're thinking about that as at the same time, that's the way
5 they're doing it.

6 **Q.** So they're not really substituting between xCloud and Xbox
7 console in the chart that you displayed on Demonstrative 29?

8 **A.** I disagree. If you have a console that you're using to
9 access the cloud by -- I mean, by definition you have a
10 console.

11 **Q.** So in your view, if someone is using a console to access
12 the cloud, do you view that as substitution between cloud and
13 console?

14 **A.** I view it as strong evidence of the ability to substitute
15 because there's nothing else you do with a console. I mean,
16 maybe a clever teenager figures out, like, you could make
17 something else with it, but the console is no good without the
18 game.

19 So if you have a console, you -- if you have a console,
20 you have a console to play games on it; and so when you're
21 accessing -- when I can see gamers, Xbox gamers, accessing the
22 cloud through a console, it tells me they have a console for
23 playing games.

24 **Q.** I'd like to ask some more questions about relevant product
25 market in this case.

1 Yesterday afternoon and this morning you discussed a
2 number of figures describing various features of gamer
3 behavior. Do you recall that?

4 A. I do.

5 Q. But in antitrust terms, the relevant product market is the
6 set of products to which consumers can turn in the face of a
7 price increase; right?

8 A. I think that's one way -- it's one way it's described. I
9 don't think it's the only way, but it's one way it's described.

10 Q. Defining a relevant product market requires identifying
11 the set of products that impose a competitive constraint;
12 right?

13 A. Correct.

14 Q. And those are products that, from the consumer's
15 perspective, are reasonable substitutes?

16 A. Yes.

17 Q. And you're not offering an opinion as to what the correct
18 product market actually is in this case; right?

19 A. I think that's right. I think my -- my opinions are
20 around the -- the -- largely the data-driven evidence but also
21 the documents and testimony that I've seen that -- that -- that
22 speak to the relevant markets that Dr. Lee has defined and that
23 they're too narrow.

24 Q. You never performed a hypothetical monopolist test; right?

25 A. Well, the analyses that I do speak directly to the

1 hypothetical monopolist test concept.

2 Q. What do you mean when you say "speak to"?

3 A. Well, the hypothetical monopolist test is a -- is one way
4 to think about identifying where that nexus of competition is.
5 And so all of the analyses that I talked through yesterday and
6 the ones that I talk to now this morning, they speak to
7 substitution. They speak to gamer behavior, and that speaks to
8 the nexus of competition, what those competitive constraints
9 are.

10 Q. But you didn't actually perform a hypothetical monopolist
11 test; right?

12 A. Well, I'm not -- I guess I'm not sure what -- what you
13 mean by that because there are many ways to do a hypothetical
14 monopolist test, and the work that I did speaks to that.

15 Q. So I guess I'm having trouble with the phrase that you
16 would say that your work "speaks to it."

17 But the term "hypothetical monopolist test" appears five
18 times in your report and each of those is in reference to the
19 hypothetical monopolist test that Dr. Lee performed; right?

20 A. So maybe that's the point of disagreement, is I disagree
21 that Dr. Lee did a hypothetical monopolist test. He says he
22 did a critical loss test and he transforms that language into
23 saying an aggregate diversion ratio, and I disagree that that's
24 what he did. I understand he's calling it that, but I disagree
25 that that's what he did.

1 Q. Okay. Understood.

2 But you also did not perform a hypothetical monopolist
3 test?

4 A. Well, to the extent that -- that Dr. Lee brought
5 information to bear on that question, I brought information to
6 bear on that question.

7 Q. You're not offering an opinion as to whether consumers
8 would substitute purchases of high-performance consoles to
9 purchases of other devices in response to a price increase;
10 right?

11 A. Can you say that question one more time?

12 Q. You're not offering an opinion as to whether consumers
13 would substitute from purchases of high-performance consoles to
14 purchases of other devices in response to a price increase?

15 A. No, I disagree. I think that that's what my analysis of
16 the Nintendo Switch entry speaks to.

17 Q. But you didn't study purchases of consoles; right? You
18 studied gamer behavior on devices they already owned?

19 A. Sure. And in economics we can have a wish list of the
20 kind of data that we want to do a study, but it's not always
21 available. And so the analyses that I did with the data that
22 was available to me speak -- they inform that question, they
23 speak to that question on substitution, how gamers behave.

24 Q. Do you recall yesterday Mr. Kilaru asked you questions
25 about your conclusions with respect to geographic market?

1 **A.** I do.

2 **Q.** You discussed some of the facts that your analyses showed
3 and that you considered including indications that across
4 geographies games are similar, devices are similar, release
5 dates are similar, gamer demographics are similar. Do you
6 recall that portion of your testimony?

7 **A.** I do.

8 **Q.** You would agree that a Taco Bell in Washington, D.C., and
9 a Taco Bell in San Francisco could also have similar menu
10 items, similar graphic design and marketing, similar item
11 sales, similar customer demographics; right?

12 **A.** Are you asking me to imagine? I could imagine.

13 **Q.** You can imagine that a Taco Bell in Washington, D.C., and
14 a Taco Bell in San Francisco would share those similar --
15 similar features; right?

16 **A.** I have not done a study of that; but if you're asking me
17 the hypothetical, I could imagine, yes.

18 **Q.** So let's assume they do.

19 **A.** Okay.

20 **Q.** But that similarity doesn't mean they're in the same
21 geographic market, does it?

22 **A.** Well, what -- what's important for understanding the
23 answer to that question is where the nexus of those competitive
24 decisions are being made. Are they being made locally at the
25 Taco Bell in San Francisco? And I apologize. I forgot the

1 other geography already. Are they being made locally or are
2 they being made -- you know, there's -- in retail, which would
3 be kind of like Taco Bell, there's omni-channel, that the
4 decisions around pricing, around selection are not made at the
5 local level. It's omni-channel. It's made at a level higher
6 up.

7 And so to evaluate that question, it is around the nexus
8 of where those competitive decisions get made, and that's what
9 I talked about yesterday. And the items you just talked about
10 now, the nexus of the decision-making for the -- for consoles,
11 it's the same product and the same brands and the same devices.
12 So those nexus are being made at a level that's broader than
13 the United States.

14 **Q.** You're aware that Microsoft recently announced a price
15 increase for Xbox and Game Pass in certain geographies but not
16 others; right?

17 **A.** You showed me a document in my deposition so I'm aware
18 through that. I don't -- as we talked about, I do not think it
19 undermines my opinion at all, but I'm aware of it.

20 **Q.** Based on your opinions, you don't have any expectation as
21 to how consumers will respond to those price increases?

22 **A.** Can you ask that question one more time?

23 **Q.** Based on the analyses that you've conducted, you don't
24 have any expectation as to how consumers will respond to those
25 price increases?

1 **A.** To -- to all of them together or -- are you -- I need a
2 little more precision in the question.

3 **Q.** To any price change by Xbox, the analysis that you've
4 performed doesn't give you an expectation as to how a consumer
5 will respond?

6 **A.** Well, I -- it -- what you're proposing is not the precise
7 study that I did, but the work that I did tells me that the
8 Nintendo Switch is a substitute.

9 The PlayStation console is a substitute. PC gaming
10 through the analysis that I've done and through the testimony
11 and documents that I've reviewed I believe is a substitute. So
12 that's informative to me that it may affect gamer behavior.

13 I haven't studied it. I don't know what would happen, and
14 I don't even know the reason why that price is being changed,
15 but I do believe my analyses do speak to that.

16 **Q.** And backing up a little bit, in general, you're not
17 offering an opinion as to whether consumers can substitute to
18 purchases outside the United States in response to a price
19 increase in the United States?

20 **A.** So I think this is the question that I was asked
21 yesterday; and if yours is slightly different, you can stop me
22 and adjust.

23 But -- but this is -- this is not an industry where we're
24 talking about there are other products or other devices or
25 other brands outside of the United States that a consumer would

1 substitute too; that it is the same products and the same
2 brands and the same devices, and that nexus of competition is
3 happening at a level broader than the U.S.

4 **Q.** But you're not offering no opinion as to whether if Xbox
5 increased its prices in certain geographies, such as the United
6 States, consumers in the United States would be able to
7 purchase Xboxes outside of the United States?

8 **A.** That's -- that's not a component of my -- of my opinion or
9 my analysis.

10 **Q.** You're not offering an opinion as to how close of a
11 substitute PCs are for gaming consoles?

12 **A.** I think I'm -- I'm offering the analysis that's contained
13 in my report and that we talked about here is that it's the --
14 the same type of games, in that -- that many console and PC
15 gamers multi-home.

16 **Q.** You're offering no opinion as to how close of a substitute
17 Switch is for Xbox and PlayStation consoles?

18 **A.** I'm offering the opinion that it is a -- that it is a
19 substitute, that it is an important rival, that it is a
20 competitive constraint.

21 **Q.** Your conclusion that it's a competitive constraint is
22 based on your observations of the gaming behavior on the
23 consoles that are described in your report and the
24 demonstratives today?

25 **A.** Well, I think it's much stronger than observations.

1 It's -- it's a quantitative data-driven analysis set out using
2 a difference-in-difference approach, which is robust technique
3 in economics. It's more than an observation.

4 **Q.** You didn't have the data of console sales to consider to
5 see how consumers respond in -- to price increases on one
6 product but not the other?

7 **A.** It's true, that sometimes the data that I would -- that I
8 would hope to have is just not available to me.

9 **Q.** And as a result, you have no basis today to opine as to
10 whether, without the transaction, consumers would substitute
11 from Xbox to PlayStation in response to a price increase such
12 as the one that Xbox recently announced?

13 **A.** I disagree with that. I -- I think the starting point
14 from Dr. Lee's report was that Xbox and PlayStation are in the
15 same relevant market; and the analyses that I did with the
16 telemetry data that I talked about speak to the gamer
17 substitution to the Nintendo console, and we talked about
18 substitution to PC. The -- I'll leave it at that.

19 **Q.** My question was about substitution between Xbox and
20 PlayStation, and so I'll rephrase it a little bit.

21 You don't have any basis to know if Call of Duty gamers,
22 for example, on Xbox could substitute to PlayStation if Xbox
23 doubled its price?

24 **A.** That's not an analysis that I've done.

25 **Q.** Turning to the importance of Activision content, we looked

1 at a variety of figures during your direct examination that you
2 rely on in reaching your opinion that Activision content,
3 including Call of Duty, is not, quote, "essential, critical,
4 must have, or uniquely important." So those are a lot of
5 adjectives, and I'm just wondering, so we're all on the same
6 page, are those synonyms for each other?

7 **A.** I guess for this purpose I'm -- I'm using -- I'm using
8 them that way; that I've seen all of those terms being used in
9 this matter, and I guess I just wanted to be complete with
10 those terms.

11 **Q.** And could we turn to your Demonstrative 8, please?

12 **MR. ANSALDO:** I believe that this one is public.

13 **MR. KILARU:** It is.

14 **BY MR. ANSALDO:**

15 **Q.** Do you have that, Dr. Bailey?

16 **A.** I do.

17 **Q.** And looking first just at the revenue column, am I correct
18 that this shows Activision gets roughly 60 percent of its
19 revenue from sales within the United States?

20 **A.** Are you asking me to compare 2.097 billion to 1.298?

21 **Q.** Well, actually first I should ask. Does the global
22 revenue include the United States revenue?

23 **A.** Yes, I consider the United States part of global.

24 **Q.** And so, right, 1.2 is roughly 60 percent of 2?

25 **A.** I'll take your representation. I'm good at math, but not

1 on the fly so quick like that.

2 **Q.** This is one of the pieces of information you used to
3 assess the importance of Activision content; right?

4 **A.** It was a starting point for me. I think that's how I
5 characterize, is that -- that it's where I started because I --
6 what I had seen with Dr. Lee's report was that it was important
7 content and that I think he was even stronger than that saying
8 that Activision had market power.

9 And so a start -- and it wasn't explained in a particular
10 relevant market; and so as a starting point for me, I wanted to
11 understand where he was coming from. I wanted to try to
12 appreciate his point of view, and that's why I put this
13 together.

14 **Q.** So if we subtract Activision's -- well, actually, the
15 United States AAA revenue for Activision Blizzard is the same
16 as all of its revenue in the United States; right?

17 **A.** So, yes, as shown here. And just flagging that, as I
18 talked about yesterday, AAA is a little bit "you know it when
19 you see it." Different people have different views of what's
20 AAA content. So to get my arms around that, I used Nielsen
21 SuperData.

22 **Q.** Okay.

23 **A.** And -- and that -- that's what -- that's what aligned in
24 Nielsen SuperData.

25 **Q.** So based on the criteria you used for AAA, all of

1 Activision's revenue in the United States is from AAA games?

2 **A.** That's probably right. I don't see all the decimal points
3 out there, but that's probably right.

4 **Q.** If we subtract Activision's United States revenue from the
5 global revenue, we could compare Activision's revenue share in
6 the United States with its revenue share outside the United
7 States; right?

8 **A.** Are you back to asking is 1.298 billion 60 percent of
9 2.097 billion?

10 **Q.** So on the -- we see that Activision Blizzard has roughly
11 12 percent share in the United States.

12 **A.** I see that.

13 **Q.** But the global share percentage includes Activision's
14 United States revenue; right?

15 **A.** Correct. That 2.097 billion contains the United States
16 revenue that's down below of 1.298 billion.

17 **Q.** And so if we removed the United States revenue from the
18 global revenue, Activision's share of global revenue would
19 actually be much smaller?

20 **A.** I -- I don't know if that's right. Like, why -- because
21 it would change my denominator too. I don't understand what
22 calculation you're aiming at.

23 I would remove the United States from -- from global
24 Activision Blizzard, but then I would leave the rest of global
25 the same including the United States.

1 Q. We can move on.

2 Just so that we can all get on the same page, you agree
3 that Call of Duty is important, you just disagree that it's a
4 unicorn?

5 A. I agree that Activision Blizzard -- in particular what I
6 was talking about was Call of Duty because that's kind of the
7 crux of this matter. I agree that Call of Duty is an important
8 and popular game. What my data-driven analyses show is that
9 it's not uniquely important or must have or essential content.

10 THE COURT: Can I ask you? Because you testified
11 yesterday to Sony how important it was, and you showed --
12 somebody stop me if I'm saying something that's not supposed to
13 be public -- that I'm going to call it the Thor game, it's the
14 God --

15 THE WITNESS: I think you can say I said it. God of
16 War Ragnarök.

17 THE COURT: Yeah, God of War. That that, from a
18 revenue point of view, is more important to Sony than Call of
19 Duty, but God of War is exclusive to Sony and Call of Duty is
20 not. So that makes sense; right? Because everyone who plays
21 God of War has to play on a PlayStation or some other Sony, but
22 Call of Duty is diffuse and set out.

23 And I know we know that people own Xboxes and PCs and
24 PlayStations. So they're spreading their Call of Duty dollars
25 out. So doesn't your analysis -- how does that -- so by saying

1 that it may be more important to Sony, but that doesn't
2 necessarily reflect on how important it is to the industry as a
3 whole because those Call of Duty dollars are being spread out
4 but God of War is only on Sony?

5 **THE WITNESS:** I think I understand what you're asking.
6 So I'm going to try to answer; but if it's not the question,
7 cut me off.

8 So the reason why I looked at that analysis the way I did
9 with respect to Sony is that the concern that was being -- that
10 is being raised and that Dr. Lee was looking at was with
11 respect to foreclosure on Sony PlayStation, and so it made
12 sense to me to look at that question about spending or
13 importance with respect to the Sony PlayStation.

14 I entirely agree that Call of Duty is available on other
15 platforms; but with respect to the question of what happens to
16 Sony, it made sense for me to look with respect to the
17 PlayStation on how those games are relatively important.

18 **THE COURT:** Okay. I understand that. I guess maybe
19 then I'm saying -- to take it further say, well, Call of Duty
20 is not so important or not so -- I guess that's what I was
21 quibbling with, that I don't think it necessarily shows that
22 because you're not looking at all of the Call of Duty dollars
23 spent cross platforms.

24 **THE WITNESS:** Correct. My -- my opinion is all of
25 those analyses are with respect to Sony PlayStation, correct.

1 **BY MR. ANSALDO:**

2 **Q.** Dr. Bailey, you did not conduct an analysis of whether
3 Activision content generally is important for gaming platforms?

4 **A.** I looked at it with respect to the Sony PlayStation and I
5 also looked with respect to Xbox.

6 **Q.** For Call of Duty?

7 **A.** For Call of Duty.

8 **Q.** For other Activision content you haven't analyzed?

9 **A.** So my focus was on Call of Duty. There -- there are
10 tables and charts in my report where I think Overwatch and
11 maybe there are some other of the Activision content appear,
12 but my focus was on Call of Duty.

13 **Q.** And you were in the courtroom yesterday when Mr. Ryan
14 testified by video?

15 **A.** I was.

16 **Q.** Do you recall his testimony that one of the reasons Sony
17 views Microsoft's current offer to be inadequate is that it
18 does not include Overwatch?

19 **A.** I can take your representation. I don't remember that.

20 **Q.** You remember this morning Mr. Kotick testifying that
21 Diablo IV, which was released on June 6th of this year, sold
22 \$666 million in its first five days?

23 **A.** Yes, I think that's what he said.

24 **Q.** You didn't conduct an analysis of the importance of
25 Diablo?

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1 **A.** I looked at Call of Duty because it is the -- the -- of
2 the Activision content that's on mobile, it's large -- it's the
3 largest.

4 **Q.** \$666 million in five days is pretty large; right?

5 **A.** Remind me, was that 2022 or 2023?

6 **Q.** That was June 6th of this year.

7 **A.** Of this year. So I -- I didn't look at it; but in part, I
8 didn't look at it because that date when it was released is
9 quite close in time. The data wasn't available to me.

10 **Q.** And you referenced God of War just a few minutes ago. Do
11 you remember when the last God of War release was?

12 **A.** I don't sitting here right now.

13 **Q.** Does 2017 seem roughly accurate?

14 **A.** I couldn't say one way or the other.

15 **Q.** Dr. Bailey, you're not offering an opinion as to whether
16 Activision content drives adoption of video game platforms;
17 right?

18 **A.** Well, I think the analysis that I talked about yesterday
19 about the -- the first game played does speak to that. When
20 I -- when I talked about that analysis, the way in which I
21 think about analysis is what's -- what's the -- what's the
22 reason you purchase that console. It can be interpreted based
23 on what game you're playing on the first day you start playing.

24 **Q.** Well, your opinions in this matter don't include anything
25 about Activision's ability to transition its business from one

1 platform to another; right?

2 **A.** I'm not sure I understand that question.

3 **Q.** I'll just restate it and we'll see.

4 Your opinions in this matter don't include anything about
5 Activision's ability to transition its business from one
6 platform to another?

7 **A.** I don't know what you mean by "transition its business."
8 If you have an example or I could try to help.

9 **Q.** If you turn to page 149 of your deposition. That's in the
10 white...

11 (Pause in proceedings.)

12 **THE WITNESS:** (Witness examines document.)

13 **BY MR. ANSALDO:**

14 **Q.** Are you at page 149, line 10? And you were asked (as
15 read):

16 **"QUESTION:** Is it consistent with your opinion that
17 Activision has the ability to transition its business from
18 Xbox to other platforms?"

19 **A.** I'm sorry, what?

20 **Q.** Line 3 or line 2.

21 **A.** On 149?

22 **Q.** I'm sorry. This is on 150. I apologize.

23 **A.** (Witness examines document.)

24 **Q.** 150, line 2. Are we there?

25 **A.** Yeah.

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1 **Q.** And you were asked (as read):

2 **"QUESTION:** Is it consistent with your opinion that
3 Activision has the ability to transition its business from
4 Xbox to other platforms?"

5 And you responded (as read):

6 **"ANSWER:** I don't express an opinion about anything about
7 Activision transitioning its Xbox business to other
8 ecosystems. I mean, that's not -- I don't even think I
9 have a paragraph that discusses that as a component of my
10 opinion."

11 Is that correct?

12 **A.** Well, I see that, but I also see that I said right before
13 you asked that question that "I guess I'm not sure what you're
14 asking. I'm not sure what you're asking that -- with respect
15 to that bullet point." So I guess I'm consistent that I still
16 don't understand, but I -- but I do see that that's how I
17 eventually responded.

18 (Pause in proceedings.)

19 **THE WITNESS:** And I see if I kept reading down --

20 **THE COURT:** Wait for the next question.

21 **BY MR. ANSALDO:**

22 **Q.** Dr. Bailey, could you turn to PX2463 in your binder? This
23 is confidential so we're going to talk around it.

24 **A.** (Witness examines document.) Okay. I'm there.

25 **Q.** If it helps to get you oriented, if it becomes necessary

1 while we're discussing the document, you cited the attachment
2 to this on page 66 of your report in Footnote 140. I just plan
3 to ask you questions about the document.

4 **A.** Say that one more. There's an attachment to this e-mail?

5 **Q.** Right. This exhibit is an e-mail with an attachment. The
6 attachment begins on page 003. It's a slide titled "Microsoft
7 Partnerships Negotiation Update."

8 **A.** I just have 01 and 02.

9 **Q.** Are you on PX2465?

10 **A.** 2463. 2463.

11 **THE COURT:** Oh, it's 5? You said 3. Do you want --

12 **MR. ANSALDO:** I apologize. PX2465.

13 **THE WITNESS:** (Witness examines document.) Okay. I'm
14 there.

15 **BY MR. ANSALDO:**

16 **Q.** This is a document, PX2465, that is cited in -- on page 66
17 of your report in Footnote 140. And on the second page there's
18 a slide deck attached titled "Microsoft Partnerships
19 Negotiation Update"?

20 **A.** I see that.

21 **Q.** If you turn to page 2465-005. Let's be careful here not
22 to discuss any of the details on this slide.

23 The title of the slide is "Partnership Negotiation
24 Update." And do you understand this to be about Overwatch 2
25 and Diablo IV partnership between Microsoft and Activision?

1 A. Yeah, I could interpret the title like that.

2 Q. And do you see the column "Microsoft Position" in the
3 table?

4 A. I do.

5 Q. Okay. And to the left is another column that has
6 categories of terms I think that are laid out in the table?

7 A. Are you talking about the blue column?

8 Q. Yes. Do you see that?

9 A. I do.

10 Q. And the first row is "Economics"?

11 A. Yes, I see that.

12 Q. And do you see Microsoft's position on economics without
13 saying it out loud?

14 A. I do.

15 Q. And the next row down is "Publishing Requirements." Do
16 you see that?

17 A. I see that.

18 Q. And then the third bullet under "Microsoft Position" is
19 "Services"?

20 A. I see that.

21 Q. We'll take a minute to read the sub-bullets under that.

22 (Pause in proceedings.)

23 BY MR. ANSALDO:

24 Q. The next row is "Media"?

25 A. I see that.

1 Q. Do you see the first bullet there?

2 A. Yes.

3 Q. And is it consistent with your opinions that these are the
4 types of terms that Microsoft seeks from an independent
5 Activision?

6 A. I mean, I -- I see what it says here on the page. I
7 see -- I see what the title of the column says.

8 Q. Okay. We can put that aside. So let's talk about the
9 but-for world.

10 That's the world that would exist without the transaction;
11 right?

12 A. Yeah. I think that's how we've been using it.

13 Q. And this morning you heard Mr. Kotick describe incentives
14 for Activision to make its games broadly available across
15 platforms as an independent publisher; right?

16 A. Yes.

17 Q. You're not offering any opinion as to how the transaction
18 would affect Activision's incentives to contribute its content
19 to rival consoles in the future?

20 A. My -- my assignment was to -- to think about other
21 economic questions, that there's another expert who's looking
22 at that.

23 Q. So you're not offering that opinion?

24 A. That -- no, I'm not.

25 Q. So you're not offering an opinion as to how the

1 transaction would affect Activision's incentives to contribute
2 its games to content subscription services?

3 **A.** Oh, I see what you mean. Well, my analyses, you know,
4 they speak to that. They -- particularly when I look at cross
5 platform or multi-region play, which we talked about yesterday,
6 it's informative to that, but my -- my opinions don't go the
7 next step to use that word "incentive" and say "What is the
8 incentive?" That's not a component of -- of the work that I --
9 that I did.

10 **Q.** And same thing is true for cloud subscription services?

11 **A.** Can you ask the whole question?

12 **Q.** You're not offering an opinion as to how the transaction
13 would change Activision's incentives to contribute its games to
14 cloud subscription services?

15 **A.** In the but-for world? Can you say that -- ask the
16 question one more time?

17 **Q.** You're not offering an opinion as to how the transaction
18 would change Activision's incentives to contribute its games to
19 cloud subscription services?

20 **A.** With the transaction?

21 **Q.** You're not offering an opinion as to the change the
22 transaction causes?

23 **A.** No, I'm not.

24 **Q.** You agree that there are circumstances under which
25 Activision will agree to contribute its games to content

1 subscription services?

2 **A.** I was here in the courtroom this morning. I heard
3 Mr. Kotick's testimony. I believe him when he -- he testified,
4 and I understand there are a limited set of circumstances when
5 he's done that in the past.

6 **Q.** So your critique of the but-for world that Professor Lee
7 describes is based on your interpretation of the data and
8 evidence that exists in this matter?

9 **A.** My understanding of the documents and testimony is that
10 the but-for world, in the absence of the transaction, is -- is
11 as Mr. Kotick testified earlier this morning; that -- that it
12 would not be on subscription services and in a way other than
13 the -- the kind of cabined way he described what he currently
14 does for testing or experiments or marketing, and the same with
15 respect to cloud.

16 **Q.** That understanding, your understanding, is based on
17 interpreting the documents and testimony in this matter?

18 **A.** I don't know that -- I mean, I heard Mr. Kotick testify.
19 I don't know that I was interpreting. I mean, I -- I heard him
20 testify.

21 **Q.** Okay. And I'd like to turn to some questions about how
22 your opinions relate to the effect of the transaction on
23 competition and consumers.

24 The only output expansion that you conclude will result
25 from the transaction is the addition of Activision content to

1 Game Pass; right?

2 **A.** I don't think that's -- that's right. The -- there is the
3 addition of the Activision content to Game Pass that I talk
4 about, and then I talk about the output expansion with respect
5 to the -- to the conditional contracts.

6 **Q.** You're not offering any opinion about what the value is
7 that results from additional content being put on Game Pass?

8 **A.** That's not a term that I used in my report.

9 **Q.** And you didn't determine specifically how the change in
10 output would impact consumer welfare?

11 **A.** No, I did not.

12 **Q.** You're not offering an opinion as to whether Microsoft
13 would seek to raise prices of Game Pass again following the
14 addition of Activision content?

15 **A.** That -- I mean, that was not -- that was not a component
16 of my -- of my analysis.

17 **Q.** And with respect to the post-complaint agreements that you
18 referenced, your analysis assumes the existence and
19 effectiveness of the agreements; right?

20 **A.** I guess if what you mean by that that I -- that I believe
21 people when they enter a contract and they're not entering it
22 like with the -- I don't know, like the willful intent to
23 violate it, I mean, I -- yeah, I guess that's how I interpret
24 it; that if someone has entered into a contract, they've
25 entered into a contract with the -- with the view that they

1 would honor the contract.

2 **Q.** Setting aside what their intent might be in entering the
3 contract, you're generally aware of the concept of incomplete
4 contracts?

5 **THE COURT:** She's not a lawyer. Why are we going into
6 this? I think this is a question for me.

7 **MR. ANSALDO:** Can I have a little leeway?

8 **THE COURT:** Sure.

9 **BY MR. ANSALDO:**

10 **Q.** Dr. Bailey, is there an economic concept of incomplete
11 contracts?

12 **THE COURT:** Ah, okay. That's a good question.

13 **THE WITNESS:** There is a field of economics that --
14 that goes under the header of incomplete contracts, which means
15 that it isn't -- it's not about violating contracts. It's
16 about that it's impossible to contract on every possible
17 contingency that might happen.

18 **BY MR. ANSALDO:**

19 **Q.** You're not offering an opinion about the combined firms'
20 incentive to deviate from the post-complaint agreements; right?

21 **A.** No, I'm not.

22 **Q.** There are some other benefits of the transaction that you
23 identify in paragraph 132 of your report. You're just taking
24 those as given what you understand Microsoft anticipates will
25 result from the transaction?

1 **A.** Can you say the paragraph number again?

2 **Q.** 132. It's pretty much at the end before the appendix.

3 **A.** (Witness examines document.) That's correct. It -- as an
4 economist, when I -- when I start my work, it's useful to
5 understand the landscape and the backdrop, and that's all
6 I'm -- I'm -- it was part of the landscape and backdrop for me.

7 **Q.** We heard this morning -- well, we've heard from many
8 witnesses, including Mr. Kotick this morning, about mobile
9 gaming. And this morning Mr. Kotick testified that Activision
10 has improved its mobile capability over the last year. Did you
11 hear that testimony?

12 **A.** I did.

13 **Q.** And that's all been after the merger agreement was entered
14 into; right?

15 **A.** You would have to represent those dates back to me. I
16 don't remember precisely what dates he was -- he was
17 mentioning, but I do remember that -- the opinion or view he
18 expressed.

19 **Q.** And that the merger agreement was more than a year ago?

20 **A.** That sounds about right, yep.

21 **Q.** You're not offering an opinion as to -- about how the
22 transaction would affect competition in any mobile market;
23 right?

24 **A.** I mean, to the extent that I put up those two pie charts
25 and I showed that -- that Xbox share is -- I'm going to do this

1 off memory -- was .3 percent and combined it was 3.8 percent,
2 that's the extent to which I'm expressing a view. It's -- it's
3 tiny. I would not think it would have an -- an affect. It's
4 tiny.

5 Q. You didn't verify any of the claimed deficiencies of the
6 transaction; is that correct?

7 A. No.

8 Q. No?

9 A. No.

10 Q. No, it's not correct or --

11 A. No, I did not.

12 Q. You did not assess the competitive effects if Call of Duty
13 were to be foreclosed?

14 A. My assignment was not to develop a model like that. A
15 different expert did that.

16 Q. You did not assess competitive effects if Overwatch were
17 to be foreclosed?

18 A. That was not -- that was not my assignment or the work
19 that I did.

20 Q. You didn't assess competitive effects if Diablo were to be
21 foreclosed?

22 A. No. Again, that was not the assignment of the economic
23 work that I did.

24 Q. So there was no assessment of competitive effects of
25 foreclosure of any Activision content in your report?

PROCEEDINGS

1 **A.** Well, the analyses that I did are informative to that; but
2 if you're asking did I write down a model, that -- that was not
3 my assignment. There's a different expert who worked on a
4 model.

5 **MR. ANSALDO:** No further questions.

6 **MR. KILARU:** Your Honor, unless you have nothing -- I
7 mean, any other questions, we don't have anything further for
8 Dr. Bailey.

9 **THE COURT:** Okay. All right. Dr. Bailey, you are
10 excused.

11 (Witness excused.)

12 **MR. KILARU:** Your Honor, if I could, consistent with
13 the ruling yesterday, move RX5055, which is Dr. Bailey's
14 report.

15 **THE COURT:** Okay. It's admitted.

16 (Trial Exhibit 5055 received in evidence.)

17 **MR. KILARU:** Thank you.

18 **THE COURT:** And did the -- yes, did you want to admit?

19 **MR. ANSALDO:** We'd like to admit PX2465, Your Honor.

20 **THE COURT:** Yes. Admitted.

21 (Trial Exhibit 2465 received in evidence.)

22 **THE COURT:** Okay. How long -- we have Dr. --
23 Mr. Fisher's --

24 **MR. WEINGARTEN:** I understand Mr. Fisher's video to be
25 roughly 27 minutes.

PROCEEDINGS

1 **MS. FLEURY:** It's 19 minutes.

2 **MR. WEINGARTEN:** Oh, 19 minutes. Even better.

3 **THE COURT:** Okay. I'm supposed to be moderating
4 something at noon. So let's just start it, and you go and I'll
5 be late to it. So play. Play.

6 **MR. WEINGARTEN:** Very kind, Your Honor.
7 Roll tape, please.

8 (Video was played but not reported.)

9 **MR. WEINGARTEN:** That's it. Thank you, Your Honor.
10 Oh. I would just like to move in to admit PX3103, please.
11 It was mentioned in the video.

12 **THE COURT:** Yes, admitted.
13 (Trial Exhibit 3103 received in evidence.)

14 **THE COURT:** Okay. We will resume at 1:30. Thank you.
15 (Luncheon recess was taken at 12:04 p.m.)

16 **AFTERNOON SESSION**

1:30 p.m.

17 **THE CLERK:** Remain seated. Come to order. Court is
18 now in session.

19 **THE COURT:** Okay. I think this is Microsoft calling
20 our next witness.

21 All right. Are you prepared to call your next witness?

22 (Pause in proceedings.)

23 **THE COURT:** Oh, is there an issue?

24 **MR. WEINGARTEN:** That's my mistake, Your Honor.
25 Actually, it's on both witness lists, I believe, so the FTC is

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1 calling --

2 **THE COURT:** And you're questioning first?

3 **MR. WEINGARTEN:** Yes, Your Honor.

4 **THE COURT:** Okay.

5 **MR. WEINGARTEN:** Mr. Satya Nadella. And my colleague
6 Mr. Jim Abell will be conducting the exam.

7 **MR. ABELL:** Good afternoon, Your Honor.

8 **THE COURT:** Oh, you may come forward.

9 (Pause in proceedings.)

10 **THE COURT:** If you stand right there, Ms. Means will
11 swear you.

12 **THE CLERK:** Please raise your right hand.

13 **SATYA NADELLA,**

14 called as a witness for the Plaintiff, having been duly sworn,
15 testified as follows:

16 **THE CLERK:** Can you please state your name for the
17 record?

18 **THE WITNESS:** Satya Nadella.

19 **THE CLERK:** Thank you.

20 **THE COURT:** You may be seated.

21 **MR. ABELL:** And, Your Honor, may we approach the
22 witness?

23 **THE COURT:** You may.

24 (Pause in proceedings.)

25 \\\

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DIRECT EXAMINATION

BY MR. ABELL:

Q. Good afternoon, Mr. Nadella.

A. Good afternoon.

Q. You are a chairman and CEO of Microsoft; correct?

A. That is correct.

Q. And you report to the board of directors; is that correct?

A. That is correct.

Q. And you have an obligation to be truthful and accurate when you make presentations to the board of directors; correct?

A. That's correct.

Q. You're familiar with the senior leadership team of Microsoft; correct?

A. Yes.

Q. And the senior leadership team is sometimes abbreviated as SLT; correct?

A. That's correct.

Q. And the senior leadership team includes the senior executives at Microsoft who report directly to you; correct?

A. And that's right, and there are also a couple people who don't report directly to me.

Q. Mr. Spencer is a member of the senior leadership team at Microsoft; correct?

A. That's correct.

Q. Microsoft's business is divided up into customer solution

1 areas; correct?

2 A. That's correct.

3 Q. And gaming is one of the customer solutions areas;
4 correct?

5 A. That's correct.

6 Q. And Mr. Spencer leads the gaming business?

7 A. That's correct.

8 Q. Mr. Spencer and his team have responsibility for managing
9 the gaming business; correct?

10 A. That's correct.

11 Q. You don't negotiate game publishing deals yourself;
12 correct, Mr. Nadella?

13 A. I don't.

14 Q. Okay. And you also don't make decisions about content
15 exclusivity yourself; correct?

16 A. That's correct.

17 Q. Mr. Spencer makes the calls about content exclusivity
18 decisions; correct?

19 A. That's correct.

20 Q. As part of your duties as CEO, you conduct Microsoft's
21 earnings calls with the investment community; correct?

22 A. That's correct.

23 Q. The purpose of those earnings calls is to highlight for
24 Microsoft's investors how the company has performed for a
25 particular quarter; is that correct?

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1 A. That's correct.

2 Q. And there are certain key metrics that are used to measure
3 that performance; correct?

4 A. That's correct.

5 Q. You try to highlight items that are important to
6 Microsoft's long-term strategy during these earnings calls; is
7 that right, Mr. Nadella?

8 A. That's correct.

9 Q. And during those earnings calls, as CEO of Microsoft, you
10 have an obligation to be truthful and accurate in your
11 statements to the investment community; correct?

12 A. That's correct.

13 Q. Mr. Nadella, Microsoft tracks share developments in the
14 newest generation of Gen 9 consoles between the company and
15 Sony; correct?

16 A. You said the newest consoles?

17 Q. Yes. Share developments in the newest generation of
18 consoles between Microsoft and Sony.

19 A. Of many things, yes, I do track that.

20 Q. And Mr. Nadella, when you conduct earnings calls with
21 Microsoft's investors, you give updates to those investors how
22 Microsoft is performing in terms of its market position for
23 next gen consoles; correct?

24 A. Yeah. I mean, we do have a gaming section in each
25 earnings call, and I try to -- you know, I try to sort of give

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1 the characterization of both our ambition of gaming as well as
2 traction we have in a given quarter. So I kind of define it
3 based on how the market defines gaming, not just by a
4 particular metric.

5 **Q.** If I could have you turn your binder to PX9015, and this
6 is the Q3 2022 Microsoft earnings call transcript.

7 **MR. ABELL:** And, Your Honor, at this time I'd like to
8 move PX9015 into evidence.

9 **THE COURT:** Admitted.

10 (Trial Exhibit 9015 received in evidence.)

11 **THE WITNESS:** Which page?

12 **BY MR. ABELL:**

13 **Q.** Mr. Nadella, can I direct your attention to page 005 of
14 PX9015? Let me know when you're there.

15 **A.** I'm there.

16 **Q.** On the fifth paragraph here, this is your section of the
17 presentation, do you see where you state (as read):

18 "With our Xbox Series S and X consoles we have taken
19 share globally for two quarters in a row and we are the
20 market leader this quarter among the next gen consoles in
21 the United States, Canada, U.K., and Western Europe?"

22 Do you see that, sir?

23 **A.** Yep.

24 **Q.** That statement was accurate when you made it to
25 Microsoft's investment community; correct?

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1 **A.** Yep.

2 **Q.** Now, Mr. Nadella, I'd like to show you a document that's
3 marked PX9084 in your binder. This is the Q4 2022 earnings
4 call.

5 **MR. ABELL:** Your Honor, at this time I'd like to move
6 PX9084 into evidence.

7 **THE COURT:** Admitted.

8 (Trial Exhibit 9084 received in evidence.)

9 **BY MR. ABELL:**

10 **Q.** If I could direct your attention to page 005 of PX9084,
11 Mr. Nadella. Do you see the fourth paragraph where you state
12 (as read):

13 "We sold more consoles life to date than any previous
14 generation of Xbox and have been the market share leader
15 in North America for three quarters in a row among next
16 gen consoles"?

17 Do you see that?

18 **A.** This is?

19 **Q.** I'm sorry, Mr. Nadella. This is page 005 of PX9084.

20 **A.** Yep. Got it.

21 **Q.** Okay. Do you see that statement, sir?

22 **A.** Yep.

23 **Q.** And that statement was true and accurate when you made it
24 to Microsoft's investors; correct?

25 **A.** Yep.

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1 **Q.** Mr. Nadella, when you refer to next gen consoles during
2 these earnings calls, you're referring to Generation 9
3 consoles; correct?

4 **A.** I believe so.

5 **Q.** Switching topics a little bit, Mr. Nadella. You submit an
6 annual CEO self-assessment as part of your performance
7 evaluation to the Microsoft Board of Directors; correct?

8 **A.** I do.

9 **Q.** I'd like you to turn to page PX1747 in your binder.

10 **A.** 1747?

11 **Q.** 1747.

12 **A.** (Witness examines document.) Okay.

13 **Q.** And, Mr. Nadella, this is your August 2022 CEO
14 self-assessment; correct?

15 **A.** Yes.

16 **MR. ABELL:** Your Honor, at this time I'd like to move
17 PX1747 into evidence.

18 **THE COURT:** Admitted.

19 (Trial Exhibit 1747 received in evidence.)

20 **BY MR. ABELL:**

21 **Q.** Now, Mr. Nadella, this document is confidential so we're
22 not going to be getting in any specifics here.

23 In general, sir, as part of the self-assessment, you
24 provide a memo dealing -- detailing some of the company's key
25 achievements in the past year; correct?

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1 A. Yes.

2 Q. And, Mr. Nadella, you're familiar with the term "SLT
3 scorecard"; correct?

4 A. Yes.

5 Q. And "SLT" means senior leadership team?

6 A. That's correct.

7 Q. The SLT scorecard contains the metrics used to track the
8 senior leadership team's performance?

9 A. That's correct.

10 Q. And you included a copy of the SLT scorecard with your own
11 performance assessment here; correct?

12 A. That's correct.

13 Q. Okay. If I could direct your attention to page 009 of
14 PX1747?

15 A. (Witness examines document.) Yes.

16 Q. Now, Mr. Nadella, we're not going to get into specifics on
17 this slide, but this slide contains the SLT metrics for
18 Microsoft's gaming business in this particular table; correct?

19 A. Yes.

20 Q. And do you see the third row of this table contains a
21 particular metric, Mr. Nadella, with a green dot?

22 A. I do.

23 Q. Okay. And at the bottom right-hand side of page 9,
24 Mr. Nadella, there is a series of footnotes that explains some
25 of the metrics. I'm going to direct your attention to the

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1 second one. I don't want you to read it out loud, but,
2 Mr. Nadella, does this footnote explain how this particular
3 metric is calculated?

4 A. It does.

5 Q. And it explains what is and what is not included in that
6 metric; correct?

7 A. That's correct.

8 Q. Now, this table highlights Microsoft's target for the
9 gaming business for this reporting period; correct?

10 A. That's correct.

11 Q. It also highlights Microsoft's actual achievement for the
12 gaming business for this reporting period; correct?

13 A. Yeah. That's one metric of the -- you know, the three
14 that I have there.

15 Q. So for this reporting period, which is your most recent
16 CEO self-assessment, Microsoft exceeded its goal on this metric
17 for the gaming business; is that correct, Mr. Nadella?

18 A. Yeah. We set it low.

19 Q. And if you could please flip to page 029 of PX1747. Let
20 me know when you're there.

21 A. Two zero --

22 Q. 029, sir.

23 A. Sorry. I'm -- 029. I don't --

24 THE COURT: The same exhibit, page 029.

25 THE WITNESS: Oh, sorry.

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1 **BY MR. ABELL:**

2 **Q.** Page 029. Same exhibit, Mr. Nadella.

3 **A.** Oh, sorry. I thought you went -- get me back to the right
4 page.

5 **Q.** Page 029 of PX1747.

6 **A.** (Witness examines document.) Okay.

7 **Q.** Now, Mr. Nadella, this is part of your actual CEO
8 self-assessment memo; correct?

9 **A.** Yes.

10 **Q.** And I'm going to direct your attention to the top portion
11 of this page. There are six bullets listed under here. Do you
12 see those, Mr. Nadella?

13 **A.** Yes, I do.

14 **Q.** Okay. Now, we're not going to read any of those bullets
15 but, Mr. Nadella, broadly speaking, these six bullets provide
16 your summary of the Microsoft Gaming business' highlights and
17 key accomplishments for this reporting period; correct?

18 **A.** Yeah. The top is the highlights and the bottom is the
19 lowlights.

20 **Q.** And, Mr. Nadella, this self-assessment memo forms part of
21 the basis for how you are compensated for your performance;
22 correct?

23 **A.** Yeah.

24 **Q.** All right. Mr. Nadella, you can set that document aside.

25 We're going to go ahead and show you what's been premarked

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1 as PX1274. If you could flip to that in your binder.

2 **A.** (Witness examines document.) Okay.

3 **Q.** Mr. Nadella, this is an e-mail from you to Mr. Phil
4 Spencer, Mr. Tim Stuart, and several other individuals with the
5 title subject as "Xbox Share versus PlayStation." Do you see
6 that?

7 **A.** Yep.

8 **Q.** Okay.

9 **MR. ABELL:** Your Honor, at this time I'd like to move
10 PX1724 into evidence.

11 **THE COURT:** Admitted.

12 (Trial Exhibit 1274 received in evidence.)

13 **BY MR. ABELL:**

14 **Q.** Mr. Nadella, you were asking Mr. Spencer and Mr. Stuart
15 and the others "What is the share difference between
16 PlayStation and us in this generation right now in the U.S.";
17 correct?

18 **A.** That's correct.

19 **Q.** Okay. And this generation, again, Mr. Nadella, that's
20 Gen 9; right?

21 **A.** That's correct.

22 **Q.** I'd like to switch topics now and talk to you a little bit
23 about cloud gaming.

24 Mr. Nadella, you're familiar with cloud streaming?

25 **A.** Yes, I am.

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1 Q. And you're familiar with cloud gaming?

2 A. Yes, I am.

3 Q. Streaming games on the cloud allows the user to
4 potentially play on lower-powered devices, such as a Samsung
5 TV; is that right, Mr. Nadella?

6 A. Yeah. I mean, it -- cloud streaming can essentially
7 transcend any device, but that would be one use case.

8 Q. And that allows gamers to enjoy the best graphics without
9 having to rely on a high-powered console, for example; is that
10 right?

11 A. Yeah. I don't think of it as a -- strictly a substitute
12 to the console. I mean, at least the market feedback to date
13 has been people love their console, people love their PCs,
14 people love their phones and use cloud gaming as an adjunct.

15 Q. By allowing those lower-powered devices to play
16 high-intensity games, cloud gaming potentially expands the
17 overall gaming market; is that right?

18 A. That's correct.

19 Q. Okay. Today, Mr. Nadella, gamers can play their games on
20 the console, the PC, and their mobile phones; is that right?

21 A. That's correct.

22 Q. Okay. Cloud gaming has the potential to emerge as the
23 fourth platform for gamers to play on -- play their games; is
24 that right?

25 A. It's potentially possible. We've been working on it for

1 close to a decade. It will take more than a decade. But, yes,
2 the feedback to date is that it's just not good enough, you
3 know, definitely as a substitute to any of the current
4 platforms. But, you know, it can break through at some point
5 on something new, but it's not yet happened both on the
6 economics as well as the content side.

7 **Q.** And you provide updates on Microsoft's cloud gaming
8 business as part of Microsoft earnings calls; correct?

9 **A.** I do.

10 **Q.** And the cloud is one of the pillars that makes up the core
11 of Microsoft's gaming strategy; correct?

12 **A.** Yes, it is.

13 **Q.** And you have highlighted that fact to Microsoft's
14 investors; correct?

15 **A.** Yeah. And just to make sure it's clear, whenever I think
16 about the cloud in the context of the Xbox pillars of content
17 cloud and community, to me Xbox Live is part of the cloud. So
18 even when you're thinking about a console or a PC, the cloud is
19 actually very integral to the experience. So it's not
20 streaming alone when I think about the cloud.

21 **Q.** And streaming is still part of that overall cloud?

22 **A.** It's a minor part of that cloud really because if I look
23 at the metrics that you were pointing me to earlier, we measure
24 monthly active users of xCloud. That's a pretty important
25 thing for Phil and team to track.

1 Q. And you've described the cloud as one of the big bets that
2 is paying off for Microsoft's gaming business in an earnings
3 call to investors last year; is that right?

4 A. Yeah, I'm sure I may have done so.

5 Q. I'm going to show you a document which has been premarked
6 as PX9102. If you can please turn to that.

7 A. (Witness examines document.)

8 MR. ABELL: Your Honor, I'd like to move PX9102 be
9 admitted into evidence.

10 THE COURT: Admitted.

11 (Trial Exhibit 9102 received in evidence.)

12 BY MR. ABELL:

13 Q. And if you could, Mr. Nadella, please turn the page to
14 page 009 of PX9012.

15 A. Okay.

16 Q. You see where you state (as read):

17 "Now on to gaming. The big bets we have made across
18 content, community, and cloud over the past years are
19 paying off. We saw record engagement as well as revenue
20 this quarter"?

21 Do you see that?

22 A. Yes, I do.

23 Q. And, Mr. Nadella, that was an accurate and true statement
24 when you made it to the Microsoft investment community;
25 correct?

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1 A. That's correct.

2 Q. And right below that, Mr. Nadella, you also highlight that
3 Microsoft's Game Pass had achieved more than 25 million
4 subscribers across PC and console; correct?

5 A. That's correct.

6 Q. And that was a true and accurate statement when you made
7 it to the Microsoft investment community?

8 A. That's correct.

9 Q. And at the very bottom of that paragraph, Mr. Nadella, do
10 you see where you highlight "and more than 20 million have
11 played Halo Infinite making it the biggest Halo launch in
12 history"? Do you see that?

13 A. I do.

14 Q. And that was a true and accurate statement when you made
15 it to Microsoft's investment community?

16 A. Yes.

17 Q. You represented to investors that Microsoft continues to
18 lead the fast-growing cloud gaming market in an investor call;
19 correct?

20 A. I may have, but are you referring to that particular --

21 Q. I'll go ahead and direct your attention, Mr. Nadella, to
22 page -- to PX9012 again.

23 A. 9012?

24 Q. Yes.

25 A. (Witness examines document.)

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1 Q. I'll direct your attention to page 006 of 9012.

2 A. Okay.

3 MR. ABELL: And, Your Honor, at this time I'd like
4 move for PX9012 to be admitted.

5 THE COURT: Admitted.

6 (Trial Exhibit 9012 received in evidence.)

7 BY MR. ABELL:

8 Q. Do you see at the very bottom, Mr. Nadella, where you
9 state (as read):

10 "We continue to lead in the fast-growing gaming" --
11 "cloud gaming market with last month" -- "just last month
12 we made Xbox cloud gaming available on PCs as well as
13 Apple phones and Tablets via the browser in 22 countries
14 with more to come"?

15 Do you see that?

16 A. Yes, I do.

17 Q. Mr. Nadella, xCloud is Microsoft's cloud gaming app; is
18 that right?

19 A. That's correct. Cloud streaming app.

20 Q. Cloud streaming app. Thank you.

21 And, again, Mr. Nadella, when you made this statement to
22 Microsoft's investors, that was a true and accurate statement?

23 A. Yes.

24 Q. Okay. Microsoft today wants to ensure that it can stream
25 its content to any platform; is that a fair statement,

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1 Mr. Nadella?

2 **A.** Yes.

3 **Q.** And you've described a future state of gaming as the North
4 Star vision; is that right?

5 **A.** Yeah. I mean, to me, as we've done and, quite frankly, as
6 a software company I always think software first, which is I
7 want to be able to work on all platforms.

8 **Q.** And you've discussed this North Star vision with
9 Mr. Spencer; is that right?

10 **A.** That's correct.

11 **Q.** I'm going to show you PX1751, which is in confidential,
12 Mr. Nadella. So I'm not going to get into any details, but if
13 you can please turn to that in your binder?

14 **A.** It's --

15 **Q.** 1751.

16 **A.** (Witness examines document.) Okay.

17 **MR. ABELL:** And, Your Honor, at this time I'd like to
18 move for PX1751 to be admitted?

19 **THE COURT:** Admitted.

20 (Trial Exhibit 1751 received in evidence.)

21 **BY MR. ABELL:**

22 **Q.** Again without going into any details, Mr. Nadella, does
23 this e-mail capture the exchange you had between you and --
24 yourself and Mr. Spencer about the North Star vision for cloud
25 gaming?

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1 **A.** It seems like it. I don't recall it, but I see it.

2 **Q.** Okay. Mr. Nadella, I'm going to go ahead and show you
3 what's been premarked as PX4066 in your binder.

4 **A.** PX?

5 **Q.** 4066.

6 **A.** Okay.

7 **Q.** Are you there, sir?

8 **A.** Yes, I do.

9 **Q.** And this is an e-mail from Ms. Bond to Mr. Spencer,
10 Ms. Wright, and Ms. McKissick. The title here is "Meta Quest
11 Event." Do you see that?

12 **A.** I do.

13 **MR. ABELL:** Your Honor, at this time I'd like to move
14 PX4066 to be admitted into evidence.

15 **THE COURT:** Admitted.

16 (Trial Exhibit 4066 received in evidence.)

17 **BY MR. ABELL:**

18 **Q.** And at the very bottom, Mr. Nadella, there's a part of the
19 chain where you write (as read):

20 "I want this to be like, say, Samsung TV like socket
21 for us when your schedule allows and they have the
22 volume."

23 Mr. Nadella, when you refer to the "Samsung TV like
24 socket," can you explain what you're referring to when you use
25 the term "socket"?

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1 **A.** Just a device endpoint.

2 **Q.** And the Meta Quest event here, Mr. Nadella, that relates
3 to the launch of a device by Meta; is that correct?

4 **A.** That's correct.

5 **Q.** And they requested a demonstration of the xCloud app as
6 part of the launch; is that right?

7 **A.** Yeah. We were part of the launch and we showed many
8 different pieces of our software from product really to gaming,
9 yeah.

10 **Q.** And if I could actually turn the page and direct your
11 attention to the top of page 002 of PX466 [sic]. Do you see
12 that, Mr. Nadella?

13 **A.** Yeah.

14 **Q.** Okay. And you write (as read):

15 "I want to make it clear to the world that Microsoft
16 is focused on cloud first approaches, Teams, WIN365,
17 xCloud as the future of their end-use sockets."
18 Do you see that?

19 **A.** Yes, I do.

20 **Q.** And, Mr. Nadella, "WIN365" is Windows 365?

21 **A.** That's correct.

22 **Q.** You also write (as read):

23 "But want to basically use every opportunity to make
24 cloud streaming more mainstream. The better it is for us
25 in the long run for all the strategic reasons we talk

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1 about."

2 Do you see that, sir?

3 **A.** I do.

4 **Q.** And, Mr. Nadella, did Microsoft debut the xCloud app as
5 part of the Meta Quest launch?

6 **A.** I'm actually not sure. I think we tried to or at least we
7 intended to by this e-mail. I'm not particularly sure whether
8 we did or not.

9 **Q.** All right, Mr. Nadella, are you familiar with the LK --
10 LKG memos at Microsoft?

11 **A.** Yes, I am.

12 **Q.** And just broadly speaking, Mr. Nadella, what is an LKG
13 memo?

14 **A.** In Windows there's this concept of the last-known good so
15 I brought it to our strategy.

16 **Q.** If I could direct your attention to page 1746 -- sorry --
17 Exhibit PX1746 in your binder, Mr. Nadella.

18 **A.** Yes.

19 **MR. ABELL:** Your Honor, I'd like to move PX1746 into
20 evidence.

21 **THE COURT:** Admitted.

22 (Trial Exhibit 1746 received in evidence.)

23 **BY MR. ABELL:**

24 **Q.** Again, Mr. Nadella, this is confidential so we're going to
25 talk around this so we don't reveal any confidential

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1 information here.

2 But broadly speaking, LKG memo set out Microsoft's overall
3 corporate strategy for the board of directors; correct?

4 A. Yeah. It's a living document that we use as a way to
5 discuss topics.

6 Q. And if I could direct your attention to page 009 of
7 PX1746. Let me know when you're there.

8 A. Yes, I am.

9 Q. Okay. And broadly speaking, Mr. Nadella, PX009 describes
10 how Microsoft is generally organized; is that a fair
11 assessment?

12 A. Yeah, it is.

13 Q. And if I could direct your attention to the second
14 paragraph. Do you see the first sentence that starts with the
15 words "For each"?

16 A. Yes, I do.

17 Q. This section sets out some priorities for the various
18 components of the Microsoft business units; is that right,
19 Mr. Nadella?

20 A. That's correct.

21 Q. And do you see at the bottom, Mr. Nadella, there's a
22 footnote that defines how these priorities are -- are captured
23 within this document? Do you see that footnote?

24 A. I do.

25 Q. Okay. If I could have you flip to page 018 of PX1746.

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1 **A.** (Witness examines document.) Yes.

2 **Q.** Again, discussing those priorities as explained with that
3 previous footnote, Mr. Nadella, the series of bullets, the very
4 top middle column, they list the priorities for the Microsoft
5 gaming business; is that correct?

6 **A.** Yes, they do.

7 **Q.** Okay. All right. Mr. Nadella, you can set that document
8 aside.

9 You discussed Microsoft's cloud streaming competitors with
10 Mr. Spencer; correct?

11 **A.** Yes, I do.

12 **Q.** Okay. I'd like to show you PX1750, if we can. If you can
13 please turn to that in your binder.

14 **A.** (Witness examines document.) Okay.

15 **MR. ABELL:** Okay. At this time, Your Honor, I'd like
16 to move PX1750 into evidence.

17 **THE COURT:** Admitted.

18 (Trial Exhibit 1750 received in evidence.)

19 **BY MR. ABELL:**

20 **Q.** Again, Mr. Nadella, I want to be careful there's
21 confidential information here. Could I direct your attention
22 to the middle of the page of the e-mail. Do you see where it
23 begins "I thought"? Do you see that?

24 **A.** I do.

25 **Q.** And you refer to one of Microsoft's cloud gaming

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1 competitors right here; is that correct, Mr. Nadella?

2 **A.** I do.

3 **Q.** Okay. I'm going to direct your attention to the top of
4 the page. Mr. Spencer responds with his views about that same
5 cloud gaming competitor; correct?

6 **A.** Yes.

7 **Q.** Now, don't read the information out loud, Mr. Nadella, but
8 in the sentence that starts with "That's right," Mr. Spencer is
9 agreeing with the point that you raised previously; correct?

10 **A.** Yeah.

11 **Q.** You can set that document aside.

12 Mr. Nadella, you're familiar with the gaming CSA SLT
13 strategy review; correct?

14 **A.** Yes.

15 **Q.** And that's where the senior leadership team sits down with
16 the leaders of the gaming business to discuss strategy; right?

17 **A.** That's correct.

18 **Q.** I'm going to direct your attention to PX1777.

19 **A.** (Witness examines document.) Okay.

20 **MR. ABELL:** Your Honor, at this time I'd like to move
21 PX1777 into evidence.

22 **THE COURT:** Admitted.

23 (Trial Exhibit 1777 received in evidence.)

24 **BY MR. ABELL:**

25 **Q.** Mr. Nadella, the Court has heard some testimony about

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1 Microsoft's xCloud app and the way it works today on consoles.

2 But consumers can access xCloud in other ways; is that
3 correct?

4 A. Yeah. They can access it from any platform, yeah.

5 Q. And, Mr. Nadella, Microsoft has a partnership with Samsung
6 to put the xCloud app on smart TVs; correct?

7 A. I believe so. I'm not into the details on it, but I
8 believe so.

9 Q. And that means that Samsung TV owners have access to the
10 xCloud app and can stream games on their smart TVs?

11 A. That's correct.

12 Q. So no console is required for that; right?

13 A. That's correct.

14 Q. Okay. No mobile phone is required for that; correct?

15 A. Correct.

16 Q. Now, playing games on a Samsung smart TV does require
17 cloud streaming on the back end; is that right?

18 A. That's correct.

19 Q. I'd like to direct your attention to page 003 of page --
20 of PX1777.

21 A. Yes.

22 Q. Now, just generally speaking, Mr. Nadella, I don't want to
23 go into any specifics, these are notes related to the CSA SLT
24 strategy review that reflect the discussion that the leadership
25 team, including you, had at this meeting; correct?

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1 A. It looks like it, yeah.

2 Q. Okay. I just want to direct your attention to the top of
3 the page, Mr. Nadella. You asked a question at the top of the
4 page. Do you see that?

5 A. Yes.

6 Q. And Mr. Spencer responded. And, again, I'm just going to
7 direct you to read the first and last part of his response to
8 yourself.

9 A. (Witness examines document.) Yeah, I do.

10 Q. Okay. And then skipping down, do you see where Ms. Bond
11 responds with the sentence that starts "We need to." Do you
12 see that?

13 A. Yeah, I do.

14 Q. And Mr. -- moving back up just a little bit, Mr. Nadella,
15 do you see where Mr. Kareem Choudhry also responds to your
16 question?

17 A. Yeah.

18 Q. And Mr. Choudhry was the corporate vice president for
19 xCloud; is that right?

20 A. That's correct.

21 Q. Okay. In Mr. Choudhry's response he talks about a
22 conversion; correct?

23 A. Yeah.

24 Q. And there's an abbreviation in the response here. Do you
25 see that, Mr. Nadella?

NADELLA - CROSS / KILARU

1 **A.** In Mr. Choudhry's?

2 **Q.** In Mr. Choudhry's response, correct.

3 **A.** Yes, I do.

4 **Q.** Okay. And "GP" stands for Game Pass; correct?

5 **A.** That's correct.

6 **Q.** And this conversation took place in November of 2022; is
7 that correct?

8 **A.** If you say so.

9 **Q.** Do you see the date on the e-mail on the first page of
10 PX1777-01?

11 **A.** Yeah.

12 **MR. ABELL:** All right. Your Honor, we have no further
13 questions at this time. Pass the witness.

14 **CROSS-EXAMINATION**

15 **BY MR. KILARU:**

16 **Q.** Good afternoon.

17 **A.** Hi.

18 **Q.** How long have you been the CEO of Microsoft?

19 **A.** Nine and a half years.

20 **Q.** And in that time has it been your general philosophy to
21 make software available on more platforms or fewer platforms?

22 **A.** More platforms. I grew up in a company that always
23 believed that software should run in as many platforms as
24 possible, and that's the Microsoft I grew up in. I believe in
25 that.

1 Q. Are you aware that Xbox has some games that are exclusive
2 to its consoles?

3 A. I believe it is; and if it is up to me, I would love to
4 get rid of the entire sort of exclusives on consoles, but
5 that's not for me to define especially as a low-share player in
6 the console market. The dominant player there has defined
7 market competition using exclusives and so that's the world we
8 live in.

9 Q. But is that the world you'd like to be the case in gaming?

10 A. I have no love for that world.

11 Q. You were also asked some questions about whether you
12 report out on Microsoft's position with the Xbox relative to
13 the PlayStation and Generation 9. Do you remember that?

14 A. I do.

15 Q. Did those consoles release at about the same time?

16 A. Yeah. In fact, that's one of the fundamental reasons why
17 I wanted to make sure. I mean, having really not won the
18 previous generation even, we were trying to track when because
19 both of them launched at the same time and there were supply
20 constraint because both the chips were being made by the same
21 designer and so, therefore, we wanted to make sure that we were
22 getting our fair share there.

23 Q. As the CEO of Microsoft, do you view competition in
24 consoles as just limited to the PlayStation and the Xbox?

25 A. I mean, at the end of the day, we are defined by the

1 market and their definition of gaming. And when I look at
2 anyone who's going to look at how Microsoft is doing in gaming
3 or how Phil and team are doing in gaming, they look at how
4 we're doing in console, which is us and Sony and Nintendo. And
5 then beyond that, how are things happening. You know, what
6 about PC gaming and what about mobile gaming, and anything that
7 may emerge in cloud gaming. All of those would be aspects of
8 our gaming ambition.

9 **Q.** You were also asked some questions about whether you've
10 tracked share in the United States among consoles. Do you
11 remember that?

12 **A.** I do.

13 **Q.** Do you view gaming as a United States specific phenomenon?

14 **A.** Not really. I mean, it's a worldwide phenomena. It's the
15 same content worldwide. It's the same consoles worldwide, same
16 PC's worldwide, same phones worldwide; but we do care about,
17 you know, having a share position in the U.S. and all the
18 markets, like including Japan.

19 **Q.** I'm sorry to make you go back to the binder, but could you
20 go to PX4066 for a minute?

21 **A.** 4066, yep.

22 **Q.** Page 002. If you look at that paragraph, I believe you
23 were asked about the first sentence and the third sentence, but
24 the second sentence reads (as read):

25 "This does not mean we take away" --

1 And you were talking about the cloud strategy here; right?

2 **A.** Yes.

3 **Q.** And the second sentence you say (as read):

4 "This does not mean we take away from all our volume
5 runners of Windows and console."

6 Do you see that?

7 **A.** That's correct.

8 **Q.** Have you seen cloud become a replacement for console
9 gaming?

10 **A.** It's not, and this has been our experience with many of
11 these new platforms. You have to be competitive in each of
12 these platforms and then look around and see what is the way to
13 expand the market.

14 **Q.** Have you been exploring cloud in order to get more
15 traction on mobile devices?

16 **A.** That's been our primary. Like, it's well known that, you
17 know, mobile systems are closed systems unlike the PC. The
18 only way is through their app stores, and one mechanism that we
19 wanted to use was cloud streaming as a way to bring more
20 competition to mobile platforms and bring sort of more
21 opportunity for more publishers even.

22 So that has been a goal, but it's not -- it's tough. It's
23 not worked out as well as we would hope to because they're just
24 too closed and browsers just don't work that well.

25 **Q.** For Activision is mobile games part of the rationale for

1 acquiring the company?

2 **A.** Oh, absolutely. I mean, I love their console games, I
3 love their PC games, and I particularly love their mobile games
4 because we don't have a footprint at all.

5 **THE COURT:** Have you played Candy Crush yourself?

6 **THE WITNESS:** I do.

7 (Laughter)

8 **THE WITNESS:** And Call of Duty.

9 **BY MR. KILARU:**

10 **Q.** Speaking of Call of Duty, I think one of the claims in
11 this case is that Microsoft would be willing to forego sales of
12 Call of Duty on the PlayStation to sell more consoles. Does
13 that strategy make any sense to you?

14 **A.** It makes no economic sense and no strategic sense. As I
15 said, our goal with Activision in particular in their content
16 and, quite frankly, our content is to get our content onto more
17 platforms and become a fantastic first-class publisher. And
18 that's what we have done, for example, with Office and I want
19 to do exactly the same thing with gaming.

20 **Q.** After the transaction was announced, did you call the head
21 of Sony?

22 **A.** We did -- I did.

23 **Q.** And why did you make that call?

24 **A.** I just wanted to make it very, very clear to Yoshida-San,
25 who's someone I have a fantastic relationship with, that there

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1 should be no ambiguity in our support for the Sony platform
2 going forward; and that this Activision relationship, in fact,
3 if anything, should be, you know, double. This will help us
4 reinforce our commitment to their platform.

5 **Q.** Have you reiterated that commitment since then?

6 **A.** Yeah, multiple times I had a chance to meet with
7 Yoshida-San as well as Mr. Ryan subsequently and I reiterated
8 that.

9 **Q.** Let me ask you here today, Mr. Nadella, will you commit to
10 continuing to ship Call of Duty on the Sony PlayStation?

11 **A.** A hundred percent.

12 **Q.** Are you aware that Microsoft has signed contracts with
13 Nintendo and five cloud providers to bring Call of Duty to
14 those platforms as well?

15 **A.** Yes, we have.

16 **Q.** Will Microsoft honor those contracts?

17 **A.** Yes, a hundred percent.

18 **MR. KILARU:** We have nothing further at this time,
19 Your Honor.

20 **REDIRECT EXAMINATION**

21 **BY MR. ABELL:**

22 **Q.** Just briefly, Mr. Nadella, you weren't personally involved
23 in negotiations with Sony regarding the proposal; is that
24 right?

25 **A.** That's correct.

PROCEEDINGS

1 Q. You deferred that to Mr. Spencer; correct?

2 A. That's correct.

3 MR. ABELL: Nothing further, Your Honor.

4 THE COURT: All right. Thank you. You are excused.

5 THE WITNESS: Thank you so much, ma'am.

6 (Witness excused.)

7 THE COURT: Okay. Who's our next witness?

8 MR. KILARU: Yes, Your Honor. We call Dr. Dennis
9 Carlton. As you know, his direct was submitted in writing.

10 THE COURT: Yes.

11 MR. KILARU: I believe it's RX5057, so we'll with
12 cross.

13 THE COURT: We'll go right to cross.

14 (Pause in proceedings.)

15 THE COURT: You can wait right there. Ms. Means will
16 swear you in.

17 THE CLERK: Please raise your right hand.

18 DENNIS WILLIAM CARLTON,
19 called as a witness for the Defendant, having been duly sworn,
20 testified as follows:

21 THE CLERK: Thank you.

22 Can you please state your name for the record?

23 THE WITNESS: Dennis William Carlton.

24 THE COURT: All right. You may be seated.

25 And you may give him the binder.

CARLTON - CROSS / FEMENELLA

(Pause in proceedings.)

THE COURT: You may proceed.

MS. FEMENELLA: Peggy Femenella for the Plaintiff.

CROSS-EXAMINATION

BY MS. FEMENELLA:

Q. Good afternoon, Dr. Carlton.

A. Good afternoon.

Q. Microsoft is paying Compass Lexicon \$2,000 an hour for your work on this case; correct?

A. They bill my time at \$2,000 an hour, yes.

Q. You've worked approximately 600 to 650 hours on this matter; correct?

A. That sounds right, yes.

Q. So that is a bill of at least \$1.2 million; correct?

A. Yes.

Q. You also receive additional compensation based on other billings that Compass Lexicon charges for work on this matter; correct?

A. That's correct.

Q. All of your income is currently from being an economic expert consultant; correct?

A. That's correct.

Q. Appendix B of your expert report includes an accurate list of the materials you relied upon in forming your opinions that are expressed in your report; correct?

CARLTON - CROSS / FEMENELLA

1 A. That's right. As I explained in my deposition, I --
2 whenever I have a footnote in my report to cite evidence, I --
3 and list it, I list that as material relied upon.

4 Q. In your materials-relied-on section of your expert report
5 in this case, setting aside data files, your opinion in this
6 case rely -- your opinions in this case rely on 29 ordinary
7 course documents; correct?

8 A. If that's what the number is, that's what it is. I have
9 no reason to dispute you. I haven't counted them.

10 Q. And only three of those 29 documents that you are relying
11 on in forming your opinions are from third parties; correct?

12 A. I haven't checked that, but I have no reason to dispute
13 what you're saying.

14 Q. In your materials-relied-on section of your report in this
15 case, your opinions in this case rely on 35 different websites
16 you visited; correct?

17 A. Again, I haven't counted them; but if that's what you say,
18 I'll -- I'll assume that's correct.

19 Q. There are no declarations listed in Appendix B; correct?

20 A. I haven't checked; but, again, I have no reason to dispute
21 what you're saying.

22 Q. So this means that you did not rely on any declarations in
23 this matter in forming your opinions in your report; correct?

24 A. Relied in the sense that I've just described. It would
25 not appear -- for every opinion in my expert report, if I feel

1 like I need a source, I put a footnote and then explain which
2 document it comes from.

3 Q. And there are no declarations included in the report;
4 correct?

5 A. I would have to check that, but I believe that's -- that's
6 correct, but I want to make clear I've seen lots and lots of
7 documents in this case.

8 Q. But they're not in your materials-relied-on list; correct?

9 A. Not relied upon in the way I described it, yes, that's
10 correct.

11 Q. You don't list Dr. Bailey's report as material you relied
12 on in forming your opinions; correct?

13 A. That is correct. My recollection is I had not seen her
14 report at the time I filed my -- my report. I've since looked
15 through it.

16 Q. Your opinions in this case rely on ten academic sources
17 cited; correct?

18 A. Again, I haven't counted them, but I have no reason to
19 dispute what you're saying.

20 Q. And these are all listed in Appendix B; correct?

21 A. They should be, yes.

22 Q. And three out of those ten academic sources were written
23 by you yourself; correct?

24 A. It's possible. I could check, but I'll -- I have no
25 reason to dispute what you're saying.

CARLTON - CROSS / FEMENELLA

1 Q. And so assuming I am correct, 30 percent of the academic
2 sources you rely on were written by you; correct?

3 A. That might be. I -- I could look. I think I must cite my
4 textbook; and if you look at my textbook, I, you know, cite
5 hundreds of academic sources, but --

6 Q. So you can --

7 A. -- I have no reason to dispute that of the ten, I was a
8 coauthor of three.

9 Q. If you need to, your report is listed at PX5004 in your
10 binder if you want to look at that.

11 A. Yes, I know that.

12 Q. You have no reason to dispute what I just said; right?

13 A. No, I'm not disputing your ability to count what's in my
14 Appendix B.

15 Q. Now, you testified as an expert in the *Arista Networks vs.*
16 *Cisco Systems* case in the Northern District of California in
17 2018; correct?

18 A. Yes, I believe that's correct.

19 Q. In *Arista Networks vs. Cisco Systems* in 2018,
20 Judge Freeman in the Northern District of California excluded
21 part of your opinions; correct?

22 A. I'd have to go back and check. My recollection is it was
23 a very minor component of my opinion.

24 Q. But that is a correct statement, that she did exclude part
25 of your opinions; correct?

CARLTON - CROSS / FEMENELLA

1 A. To my recollection, I'd have to go back and check, she
2 excluded the ability for me to provide any statements that had
3 legal significance, and I never intended to do that. So she
4 just made clear she didn't want to hear an economic view of
5 what the law should be.

6 Q. And in excluding part of your opinions, Judge Freeman
7 found that, quote, "Dr. Carlton essentially opines that certain
8 conduct should not be punished by the antitrust laws"; correct?

9 A. That's what she said; but, again, I wasn't intending to,
10 you know, interpret the law. I was saying what an economic
11 view of competition would imply.

12 Q. Federal courts have excluded your analysis in part in at
13 least five separate cases; correct?

14 A. Perhaps. I would have to check that.

15 Q. Do you have any reason to dispute that?

16 A. I don't have a reason to dispute that; but, again, in most
17 instances, my recollection is that the judge wanted to make
18 clear that my economic views on what the law should be was not
19 something that should be interpreted as giving a legal opinion,
20 and I never intended to do that. I'm not a lawyer.

21 Q. And these exclusions include being partially excluded
22 twice in the Northern District of California; correct?

23 A. That, I would have to check.

24 Q. The second case was *In Re: Cathode Ray Tube Antitrust*
25 *Litigation* in 2017; correct?

CARLTON - CROSS / FEMENELLA

1 A. That, I would have to check.

2 Q. You testified in that case; correct?

3 A. *Cathode Ray Tubes*, yes.

4 Q. And the latest exclusion of your opinions came in just
5 May 2023 in the *American Airlines-JetBlue* matter; correct?

6 A. That I was precluded from testifying?

7 Q. That your opinions were excluded; correct?

8 A. My recollection is the judge disagreed with one of my --
9 with my analysis. I don't believe he excluded my opinion.

10 Q. Sorry. Let me clarify.

11 So in the *JetBlue* matter, the Court found that your
12 opinions were entitled to no weight; correct?

13 A. That's correct, but my understanding is -- well, it
14 doesn't matter what my understanding is. The case is on
15 appeal.

16 THE COURT: Was that in a district or was that an ALJ?

17 MS. FEMENELLA: District court.

18 THE WITNESS: District court.

19 BY MS. FEMENELLA:

20 Q. But you're not a lawyer; correct?

21 A. I am not a lawyer.

22 Q. And you're not offering any legal opinions in this case;
23 correct?

24 A. Sorry. I didn't hear you.

25 Q. I'm sorry. You are not offering any legal opinions in

1 this case?

2 A. That's correct.

3 Q. Now, you do agree there are some circumstances in which a
4 vertical merger can be anticompetitive; correct?

5 A. Yes, in some limited circumstances that can be true.

6 Q. You did not attempt to define a relevant market; correct?

7 A. I did not do that in this case. Someone else did that.

8 Q. You do not have an opinion one way or another about
9 relevant antitrust markets in this case; correct?

10 A. I am not giving an opinion about relative antitrust
11 markets in this case.

12 Q. You are not relying on Dr. Bailey's report for any product
13 market statements in your report; correct?

14 A. That's correct, yes.

15 Q. You did not create your own demand model as part of your
16 opinions; correct?

17 A. I did not. I modified Professor Lee's model to show its
18 unreliability and inadequacy to justify in particular
19 20 percent conversion rate.

20 Q. But you didn't do your own model; correct?

21 A. Correct. I modified his model.

22 Q. And you do not offer your own foreclosure model in this
23 report or this case; correct?

24 A. Again, on the foreclosure model I used what he put forth
25 and showed if you correct certain errors, you get no

1 foreclosure.

2 Q. But you didn't do your own model; correct?

3 A. Well, I modified his model.

4 Q. That's not doing your own model; correct? You used
5 Dr. Lee's model?

6 A. Well, I used the framework and he's using the framework in
7 part derived from some of the Microsoft modeling, but I altered
8 some of the assumptions in his model to show you get a
9 different result.

10 Q. In your written direct, you referred to Sony using
11 exclusivity to promote sales of their consoles; correct?

12 A. I could check my direct, but I certainly believe that.

13 Q. Microsoft also has agreements with third-party publishers
14 that require partial exclusivity of certain games; correct?

15 A. Microsoft has certain exclusivity arrangements; is that
16 what you're asking.

17 Q. Yes.

18 A. Yes.

19 Q. Could you please turn to PX3354 in your binder?

20 A. 365 --

21 Q. 3354, sir.

22 A. 3354.

23 (Witness examines document.) Yes.

24 MS. FEMENELLA: This document, I believe, Your Honor
25 is meant to be under seal so I'm going to talk around it.

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1 **THE COURT:** Okay.

2 **BY MS. FEMENELLA:**

3 **Q.** This is an e-mail and a -- Dr. Carlton, we're doing this
4 in open court even though the document is sealed so we can't
5 say anything out loud on what the document actually says so
6 we're just going to have to be a little creative here.

7 **A.** Okay.

8 **Q.** So you see PX3354 and it's an e-mail with an attachment;
9 correct?

10 **A.** It's an e-mail, yes.

11 **MS. FEMENELLA:** Your Honor, I move to admit PX3354.

12 **THE COURT:** Okay. I'll admit it and it should be
13 confidential.

14 (Trial Exhibit 3354 received in evidence.)

15 **BY MS. FEMENELLA:**

16 **Q.** Sir, if you could please turn to PX3354-020. Again,
17 please do not say anything out loud about what's on that slide.

18 **A.** What page are you asking me to look at?

19 **Q.** PX3354-020.

20 **A.** 020.

21 (Witness examines document.) okay.

22 **Q.** And you see the charts on this page?

23 **A.** There was a chart, yes.

24 **Q.** And now if you look at the chart on the left -- and,
25 again, please don't say anything about any of the details --

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1 that chart has 16 rows; correct?

2 **A.** That's right.

3 **Q.** And the chart on the right has 13 rows; correct?

4 **A.** I'll take your word for it. It looks right.

5 **Q.** PX3354 is not included in your Appendix B for materials
6 relied on; correct?

7 **A.** I don't believe so.

8 **Q.** And you did not rely on PX3354 in forming your opinions;
9 correct?

10 **A.** That would be correct. If it's not listed, it wouldn't be
11 in my -- a footnote in my report. If it is not listed in
12 Appendix B.

13 **Q.** I'm done with that one, sir.

14 If you could turn to PX4743 in your binder, please.

15 **A.** Of course.

16 **MS. FEMENELLA:** Your Honor, this document, I believe,
17 is also mostly under seal. Counsel said I could say what the
18 actual document is, just none of the details.

19 **THE COURT:** Sure. We'll admit it and it will be under
20 seal other than the title.

21 **MS. FEMENELLA:** Thank you.

22 (Trial Exhibit 4743 received in evidence.)

23 **BY MS. FEMENELLA:**

24 **Q.** Sir, are you at PX4743?

25 **A.** Yes.

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1 Q. This is a co-marketing and development agreement between
2 Microsoft and Activision; correct?

3 A. That, I can't tell. Let me read it.

4 (Witness examines document.) Yes.

5 Q. Now, again, just please don't say any of the terms out
6 loud when I point you places.

7 If you could look at Section 1.2. That lists what is part
8 of this agreement; correct?

9 A. I see 1.2, yes.

10 Q. Do you see that's the content included; correct?

11 A. It gives a definition.

12 Q. Could you please turn to Section 8.10.1? It's on page
13 PX4743-014 and it's Section 8.10.1.

14 A. 10.1?

15 Q. Yeah.

16 A. (Witness examines document.) I don't see a 10.1. What
17 page?

18 Q. I'm sorry. It's 8.10.1. It's on page 14.

19 A. 8.10.1.

20 (Witness examines document.) Yes, I have that now. Yes.

21 Q. Do you see that section and you can see what is -- what it
22 is describing?

23 A. I see it. Do you want me to read it?

24 **THE COURT:** To yourself.

25 **MS. FEMENELLA:** Yeah. Thank you.

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1 **THE WITNESS:** Oh.

2 (Witness examines document.) I don't know if I can ask
3 this question. There's a term here, I don't know what it
4 means.

5 **THE COURT:** She'll ask the question.

6 **BY MS. FEMENELLA:**

7 **Q.** Actually, you did not rely on PX4743 in coming to your --
8 in forming your opinions; correct?

9 **A.** If it's not in my appendix, I wouldn't have relied upon it
10 in the way I defined "rely."

11 **Q.** And PX4743 is not included in your Appendix B; correct?

12 **A.** I'd have to check that, but I'll take your word for it.

13 **Q.** I'm done with that document, sir.

14 Now, your understanding is that Microsoft intends to put
15 new Call of Duty titles into its Game Pass subscription on the
16 day they're released; correct?

17 **A.** Day and date, yes.

18 **Q.** Your understanding is that putting Call of Duty into
19 Game Pass was a prime motivation of this deal; correct?

20 **A.** I believe that's correct, yes.

21 **Q.** In your opinions in your report, you rely heavily on the
22 assumption that Call of Duty will be put on Game Pass
23 post-merger; correct?

24 **A.** Correct.

25 **Q.** I'd like you, sir, to turn to PX4894 in your binder.

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1 **A.** 4894?

2 **Q.** Correct. And please don't say anything out loud about
3 this document either. There's been a request for this document
4 to be sealed.

5 **MR. KILARU:** Yes, that's right.

6 **BY MS. FEMENELLA:**

7 **Q.** PX4894 is an e-mail chain among Microsoft executives dated
8 February 2023; correct?

9 **A.** Yes. 2-15-2023, that's my birthday.

10 **MS. FEMENELLA:** Your Honor, I move to admit PX4849.

11 **THE COURT:** Admitted.

12 (Trial Exhibit 4849 received in evidence.)

13 **BY MS. FEMENELLA:**

14 **Q.** Now, Dr. Carlton, Matt Booty is the head of Xbox Game
15 Studios; correct?

16 **A.** I believe that's correct, yes.

17 **Q.** Now, if you could look on the first page, so PX4894-001,
18 do you see where there is a Matt Booty e-mail at the top?

19 **A.** There's a what in the e-mail?

20 **Q.** It's an e-mail from Matt Booty, but please do not say
21 anything else about the document out loud.

22 **A.** Yes.

23 **Q.** Do you see where he writes and it starts "I sent"?

24 **A.** Yes.

25 **Q.** Could you please read that to yourself?

1 A. Yes.

2 Q. Do you see that?

3 A. Just those few lines? I've read them.

4 Q. Yes.

5 A. Yes.

6 Q. You did not rely on PX4894 in forming your opinions;
7 correct?

8 A. Not to the best of my recollection. If it's not in my
9 appendix, I would not have relied on it in the way I described.

10 Q. And PX4894 is not listed in Appendix B of your report;
11 correct?

12 A. I haven't checked it, but I don't recall -- I don't recall
13 relying on this document.

14 Q. You may put that away, sir.

15 One of your opinions in this matter is that the agreements
16 Microsoft signed during the pendency of this litigation are pro
17 competitive; correct?

18 A. Yes, compared to the but-for world of the transaction not
19 going forward.

20 Q. Specifically your opinion is that these agreements are
21 merger-specific efficiencies; correct?

22 A. Yes.

23 Q. You also opine that Sony could avoid any potential harm
24 from the merger by signing a contract with Microsoft to ensure
25 it has access to Call of Duty on its current and future

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1 consoles; correct?

2 **A.** Yes. I mean, I don't have the words in front of me, but
3 I believe what you just said. I agree with what you just said.

4 **Q.** You're aware that Microsoft made an offer to Sony
5 regarding Call of Duty; correct?

6 **A.** Yes.

7 **Q.** You rely on the existence of this offer in forming your
8 opinions in this case; correct?

9 **A.** In part.

10 **Q.** You are aware that Sony has not signed this offer;
11 correct?

12 **A.** I am aware of that and I talk about that in my report.

13 **Q.** You have used this fact in part in forming your opinions;
14 correct?

15 **A.** Yes.

16 **Q.** In your report at paragraph 24 --

17 **A.** Wait. Let me --

18 **MS. FEMENELLA:** Is paragraph 24 allowed to be spoken
19 about?

20 **MR. KILARU:** I'm sorry?

21 **THE COURT:** His declaration or the report?

22 **MS. FEMENELLA:** The report.

23 (Pause in proceedings.)

24 **MR. KILARU:** That's okay.

25 \\\

1 **BY MS. FEMENELLA:**

2 **Q.** Sir, in your report at paragraph 24 you state, quote (as
3 read):

4 "It is peculiar to claim that Sony's consoles will be
5 foreclosed from Call of Duty when Sony refuses to sign a
6 contract that Microsoft offered to guarantee PlayStation
7 access to Call of Duty."

8 Correct?

9 **A.** Yes.

10 **Q.** So it is your opinion that Microsoft's offer to Sony
11 guarantees access to Call of Duty; correct?

12 **A.** Yes, that's my -- my characterization. That's my
13 understanding, yes.

14 **Q.** You did not even cite Microsoft's written offer to Sony in
15 your report; correct?

16 **A.** I'd have to check that. I believe that's correct.
17 I believe I cite Mr. Ryan's characterization of --

18 **Q.** But you do not cite the written offer to Sony; correct?

19 **A.** Yes. I've seen the written offer and I saw it before I
20 wrote my report, but I'm citing Mr. Ryan for the proposition
21 that he has an offer and it had the -- am I allowed to say what
22 the footnote says?

23 **Q.** I don't think so.

24 Microsoft's written offer to Sony is not listed in your
25 materials relied on; correct?

1 **A.** That's correct, but I cite Mr. Ryan's characterization of
2 the offer.

3 **Q.** Yes, that's not what I asked you. I was focused on the
4 fact that you do not cite or rely on the actual written offer.

5 **A.** That's correct, I don't.

6 **THE COURT:** What is the footnote that you're referring
7 to.

8 **THE WITNESS:** I'd have to find it. It's where I talk
9 about the offer and I -- I cite Mr. Ryan for my
10 characterization -- for characterizing --

11 **THE COURT:** All right. Maybe we can --

12 **THE WITNESS:** -- the offer.

13 **THE COURT:** No, no. Don't look for it.

14 Okay. Next question.

15 **BY MS. FEMENELLA:**

16 **Q.** One of your opinions is that, quote (as read):

17 "As an economic matter, that behavior is an
18 indication that Sony is more concerned about preventing
19 Xbox from becoming a more potent competitor (or using the
20 regulatory review process to extract even more favorable
21 terms for the distribution of Activision content) than it
22 is with the possible loss of access to Call of Duty."

23 Correct?

24 **A.** Could you just tell me where you're reading from? I was
25 looking for that footnote.

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1 Q. Same paragraph. Paragraph 24, sir, of your report.

2 A. One of the footnotes where I cite Ryan is Footnote 65.

3 THE COURT: Now go to the bottom of page 20.

4 THE WITNESS: Okay.

5 THE COURT: Read to the top of page 21.

6 THE WITNESS: Okay. It is "As an economic..." Yes,
7 that behavior is an indication that Sony is more concerned
8 about preventing Xbox from becoming a more potent competitor or
9 using the regulatory review process to extract even more
10 favorable terms for the distribution of Activision content than
11 it is with the possible loss of access to COD.

12 BY MS. FEMENELLA:

13 Q. And you are forming that opinion without relying on
14 Microsoft's actual written offer to Sony; correct?

15 A. Well, again, rely in the sense that it's not cited in my
16 footnote, but what I cite in the footnote is Mr. Ryan's
17 characterization of the offer. My understanding is the offer
18 is not in dispute, but --

19 THE COURT: Did you -- did you read the contract --

20 THE WITNESS: Yes.

21 THE COURT: -- before you wrote this report?

22 THE WITNESS: Yes, I did.

23 BY MS. FEMENELLA:

24 Q. But you chose not to rely on it?

25 A. No. I don't --

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1 **THE COURT:** No, he didn't put it in Appendix B.

2 Next question.

3 **BY MS. FEMENELLA:**

4 **Q.** In your report you list and describe just two terms from
5 the Sony agreement; correct? The Sony proposal. Apologies.

6 **A.** In my report?

7 **Q.** Yep.

8 **A.** The report speaks for itself. If I remember right, I'd
9 say it's guaranteeing access to Call of Duty and it's giving
10 the terms.

11 **MR. KILARU:** Please.

12 **THE CLERK:** Mr. Kilaru wanted him to stop.

13 **MR. KILARU:** Sorry. Apologies.

14 **THE COURT:** You're okay.

15 **MR. KILARU:** A little paranoid at this point. Thank
16 you.

17 **MS. FEMENELLA:** It's the first term that is public.
18 The second one is not.

19 **MR. KILARU:** Yes.

20 **BY MS. FEMENELLA:**

21 **Q.** And the two terms that you rely on are the length of time
22 and the revenue split; correct? Do not say what the --

23 **A.** I do rely on those, but I don't see those in paragraph 24.
24 I think --

25 **Q.** This is in your report in general, sir.

1 **A.** It's I believe later in the report in paragraph 24. I
2 mean, I won't -- it speaks for itself.

3 **Q.** You would agree that there are other terms in Microsoft's
4 proposal to Sony; correct?

5 **A.** Yes.

6 **Q.** Your report does not include any economic analysis of any
7 of the terms in the Sony proposal; correct?

8 **A.** That's correct. I'm simply making the point Microsoft has
9 made an offer to guarantee -- Microsoft -- sorry -- to
10 guarantee Sony access to Call of Duty on -- and I won't say the
11 terms. I mean, I do say the terms but I won't say them in open
12 court.

13 **Q.** You say two terms; correct?

14 **A.** Yes.

15 **Q.** And you did not believe it was necessary to include any
16 economic analysis of any of the terms in the Sony proposal;
17 correct?

18 **A.** Not for the point I'm making, which is that that contract
19 would guarantee access; and if access is the issue and the
20 terms on which the access are granted are terms that are
21 consistent with other market evidence, then a reasonable
22 interpretation on my part is that it is not that Sony is
23 concerned about foreclosure but rather -- because they could
24 easily solve that problem, but with some other motivation.

25 And as an economic matter, it's perfectly understandable

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1 why a transaction that would make your competitor more
2 powerful, more potent, more effective as a competitor would be
3 something you should be concerned about.

4 Q. You didn't do any economic analysis of the proposal;
5 right?

6 A. Other than what I do in the report; namely, that if you're
7 worried about access, this solves that problem. Access to Call
8 of Duty.

9 Q. In coming to your opinion related to the Sony proposal,
10 you state in your report that the contractual terms are similar
11 to those of contracts that already exist; correct?

12 A. I can say that. It would help me if you tell me in the
13 report --

14 Q. Paragraph 24 of your report, sir.

15 A. (Witness examines document.)

16 Q. You see that; correct?

17 A. I do talk about it, but I don't see -- about those terms,
18 but it's not in paragraph 24 unless I'm missing something.

19 Q. Where it starts (as read):

20 "To assume that contracts cannot effectuate
21 transactions is an un" -- "is an extreme assumption
22 especially when the contractual terms are similar to those
23 of contracts that already exist."

24 Do you see that?

25 A. Yes, but --

1 Q. Now you don't cite --

2 A. -- you asked me a question about the two terms. I'm
3 pointing out that's not what this paragraph is about. I agree
4 with the sentence you wrote. I'm happy to answer a question
5 about it.

6 Q. That's what I'm asking you, sir, about that sentence.

7 Now, you don't cite anything, any documents, in that
8 footnote to that point; correct?

9 A. I don't cite a document for the proposition that contracts
10 can effectuate transactions, that's correct.

11 Q. That the contractual terms are similar to those of
12 contracts that already exist. You have no cites to that point;
13 correct?

14 A. I do. Did you look at Footnote 65?

15 Q. The footnote that is there is Footnote 64; correct, sir?

16 A. I'm sorry? What did you say? Look at Footnote 65.

17 Q. Footnote 64 does not contain any document cites; correct?

18 THE COURT: When you are referring to the contract
19 terms that are similar, you're referring to those two terms --

20 THE WITNESS: Yes.

21 THE COURT: -- that we discussed?

22 Okay. That's what he's referring to. He's relying on
23 just those two; right? Just those two?

24 THE WITNESS: Yes, but --

25 THE COURT: Just those two?

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1 **THE WITNESS:** -- I think it's somewhere else in the
2 report where I actually have a cite to those two terms, but --

3 **THE COURT:** Okay. Well, that could be. We don't need
4 to do that. There will be redirect.

5 Okay.

6 **BY MS. FEMENELLA:**

7 **Q.** You did not compare the terms of any existing agreements
8 with the full Sony proposal; correct?

9 **A.** I'm only -- what I'm focusing on is that it's for "X"
10 years -- I won't say what "X" is -- and its focus -- which is
11 longer than the typical term. I don't know if -- well, and
12 it's a certain split that is --

13 **THE COURT:** Okay. I understand.

14 **THE WITNESS:** Okay.

15 **BY MS. FEMENELLA:**

16 **Q.** Are you aware that Sony signed an agreement with ZeniMax
17 related to the game Ghostwire?

18 **A.** I'm sorry. Say that once more.

19 **Q.** Are you aware that Sony signed an agreement with ZeniMax
20 related to the game Ghostwire?

21 **A.** I don't have a specific recollection of that. I might
22 well have been aware of that fact at some time.

23 **Q.** You are aware that Microsoft acquired ZeniMax for roughly
24 \$7 billion; correct?

25 **A.** I'm aware of that.

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1 **Q.** Since Microsoft now owns ZeniMax, you had access to a copy
2 of the Ghostwire agreement; correct?

3 **A.** I had access to everything in the record --

4 **Q.** Please turn --

5 **A.** -- is my recollection.

6 **Q.** Please turn to PX4678 in your binder.

7 **A.** (Witness examines document.)

8 **Q.** This document itself is under seal so please don't
9 disclose any terms in here.

10 But PX4678 is the Ghostwire agreement; correct?

11 **A.** Can you just -- I don't see where Ghostwriter [sic] --

12 **THE COURT:** Right at the top.

13 **THE WITNESS:** Ghostwire.

14 **THE COURT:** Yes.

15 **BY MS. FEMENELLA:**

16 **Q.** That's what I said. Ghostwire.

17 **A.** Yes.

18 **MS. FEMENELLA:** Your Honor, I move to admit PX4678.

19 **THE COURT:** Admitted.

20 (Trial Exhibit 4678 received in evidence.)

21 **BY MS. FEMENELLA:**

22 **Q.** You did not rely on PX4678 in forming your opinions;
23 correct?

24 **A.** That would be correct, yes.

25 **Q.** PX4678 is not listed in your Appendix B; correct?

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1 **A.** I don't believe it is. I'll take your word for it.

2 **Q.** Now, sir, if you could do me a favor and pop that document
3 out of your binder, please, so you can have it set aside next
4 to you. And then if you could turn to RX2170.

5 **A.** 2170?

6 **Q.** Correct.

7 **A.** Yes.

8 **Q.** This document is also under seal.

9 **A.** Okay.

10 **Q.** RX2170 is Microsoft's unsigned written proposal to Sony;
11 correct?

12 **A.** I believe that's correct, yes.

13 **MS. FEMENELLA:** Your Honor, just for the record,
14 RX2170 was already admitted.

15 **THE COURT:** Yes.

16 **BY MS. FEMENELLA:**

17 **Q.** Now, sir, you did not compare the terms of Microsoft's
18 proposal to Sony, which is RX2170, with the terms in the
19 Ghostwire agreement, PX4678; correct?

20 **A.** You're asking me did I compare the Ghostwire terms to the
21 terms in this agreement.

22 **Q.** Correct. You did not do that; right?

23 **A.** I did not -- I did not do that, but what I referenced --

24 **THE COURT:** No, no, no. That's it.

25 **THE WITNESS:** Okay.

1 **THE COURT:** Next question.

2 **BY MS. FEMENELLA:**

3 **Q.** Can you please turn again -- and this is under seal so
4 please do not divulge any information.

5 Can you please turn to Exhibit A in the Ghostwire
6 agreement PX4678-017?

7 **A.** Okay. Exhibit A?

8 **Q.** Yes.

9 Do you see Exhibit A without disclosing any information on
10 that?

11 **A.** (Witness examines document.) I have Exhibit A.

12 **Q.** Now, the Sony proposal RX2170 does not contain any terms
13 similar to those contained in Exhibit A of the Ghostwire
14 agreement; correct?

15 **A.** The Ghostwire agreement, just so I'm clear, does not deal
16 with Call of Duty; right?

17 **Q.** No. It's a different game.

18 **A.** So you're asking me did I compare this contract to the
19 one --

20 **Q.** You've already said, sir, that you did not compare them.
21 I am now asking you: Does the Sony proposal that Microsoft
22 made to Sony contain any of the terms that are in Exhibit A?

23 **A.** I'd have to check, but I didn't do that comparison. If
24 you want me to do it now, I can so I can compare the Call of
25 Duty proposal to this other contract if you want. Is that what

1 you're asking me to do?

2 Q. So you don't believe -- let me go back.

3 In your report you said that these were similar terms, but
4 you were only relying on two terms for similarities not all
5 terms in ordinary course content agreements; correct?

6 A. Well, maybe you misinterpreted. When I said that the
7 split -- and I won't mention it -- is -- I don't know if I can
8 say this -- it's similar to a split elsewhere, I was referring
9 specifically to Call of Duty. Okay?

10 You're asking me to compare two different -- you know,
11 contract for Call of Duty or contract not for Call of Duty,
12 but --

13 Q. You didn't do that?

14 A. -- I didn't do that.

15 Q. Right.

16 A. I didn't think that was relevant.

17 Q. Sir, you can put the Ghostwire agreement away.

18 A. Okay.

19 Q. Keep out RX2170, please.

20 A. You want me to turn to which one?

21 Q. RX2170. You should have had that open.

22 A. That's the one between Sony and --

23 Q. The Microsoft proposal to Sony.

24 A. Yes, okay.

25 Q. Again, this is under seal so please do not read anything

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1 out loud, but please look at Section 1.9.

2 A. (Witness examines document.) Okay.

3 Q. Please look at this part where the sentence that begins
4 with "That makes it." And please don't read anything else.

5 Do you see it? It's is the second-to-last line in that
6 section?

7 A. Yes.

8 Q. Do you see that there are two words after "That makes it"?

9 A. Yes.

10 Q. You did not analyze the implications of this term;
11 correct?

12 A. I haven't studied the implication of these two terms.

13 Q. And you did not consider if under this clause Microsoft
14 and Activision get to determine whether or not this term
15 applies; correct?

16 A. I'm not a lawyer so I wouldn't claim to have the legal
17 expertise to interpret contractual terms and obligations. I
18 just assumed this contract for what it was: I'll give you
19 access to Call of Duty on terms that are what they are, which,
20 as I've explained, compared to other Call of Duty terms seem
21 reasonable.

22 Q. Could you please turn to Exhibit B.6 in this same
23 document, RX2170? It is on the last page of the agreement --
24 of the proposal.

25 A. B.6?

1 Q. Yes.

2 A. (Witness examines document.) Okay.

3 Q. If you can look at the second paragraph that starts with
4 "Prior to," and if you can read the first sentence.

5 A. Out loud or to myself?

6 Q. To yourself.

7 A. (Witness examines document.) Yes.

8 Q. In reaching your opinion, you did not take into
9 consideration this term of the proposal; correct?

10 A. I wouldn't have taken into account this particular term.
11 On the other hand, I always assume contracts are entered into
12 in good faith so I won't reveal what this says, but I don't
13 know how it would have affected any analysis.

14 But you're correct, as I said earlier, what I relied upon
15 was my understanding that there is an offer and that it
16 contained terms that we've already discussed and that from my
17 point of view, that would resolve any concerns of Sony about
18 access to Call of Duty.

19 Q. You are aware that Microsoft signed an agreement with
20 Nintendo; correct?

21 A. Yes.

22 Q. Are you aware of how quickly the agreement between
23 Microsoft and Nintendo was signed?

24 A. How quickly, was that the word?

25 Q. Yes.

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1 **A.** My understanding was it was signed, you know, since the
2 deal was announced.

3 **Q.** Could you turn to PX7065 in your binder, please?

4 **A.** 7065?

5 **Q.** I'm sorry. 7060.

6 **A.** Is that my report?

7 **Q.** No. I'm sorry. I had it right the first time. 7065.

8 **A.** 7065.

9 (Witness examines document.) You'll have to give me a
10 little help. Where is that in my -- oh, here it is. 7065. I
11 have two 7065s.

12 **Q.** It's right after the declaration tab.

13 **A.** I have a 7065.

14 **Q.** Yes. Do you have that?

15 **A.** 7065. Yes, okay.

16 **Q.** These are excerpts from Mr. Singer's deposition. This
17 part is under seal so if you could just look at transcript
18 page 119, lines 14 to 19, and please don't read it out loud.

19 **A.** 14...

20 (Witness examines document.) Yes.

21 **Q.** That contains the information on the length of time it
22 took to negotiate the agreement; correct?

23 **A.** I don't know that for certain, but I'm willing to accept
24 that representation if that's what you're telling me this is
25 about.

CARLTON - CROSS / FEMENELLA

1 Q. That was under oath testimony; correct?

2 A. That's under what?

3 Q. Under oath testimony by Mr. Singer.

4 THE COURT: I'll answer that for him. Yes.

5 (Laughter)

6 BY MS. FEMENELLA:

7 Q. Now, sir, you are not an expert in the technology of video
8 games; correct?

9 A. Correct.

10 Q. You are not offering an opinion about the quality that can
11 be expected from Call of Duty if it were to be ported to
12 current or future versions of the Nintendo Switch; correct?

13 A. I'm not offering an opinion on that. I mean, I'm -- you
14 know, based on my expertise, no.

15 Q. Now, how important the option of Call of Duty on
16 Nintendo Switch is will depend upon the quality of Call of Duty
17 on the Nintendo Switch; correct?

18 A. Well, generally the better the quality of a game, the
19 better an alternative it is to play it on one place versus
20 another.

21 Q. And the worst the quality, the worst the option; correct?

22 A. Yes.

23 Q. Sitting here today you have no idea what the quality of a
24 future Call of Duty game done by Microsoft on Nintendo will be;
25 correct?

1 **A.** That's correct.

2 **Q.** You rely in forming your opinions on the fact that
3 Microsoft signed an agreement with Nvidia; correct?

4 **A.** Yes.

5 **Q.** The Nvidia agreement with Microsoft is not cited in your
6 report; correct?

7 **A.** I thought I referred to the agreements with cloud
8 producers. I don't know if I listed them.

9 **Q.** The Nvidia agreement is not included in your Appendix B;
10 correct?

11 **A.** Whatever is in the appendix is in the appendix. I do
12 refer in the report to my understanding that there are
13 agreements with cloud providers and that, you know -- period.

14 **Q.** Please look at paragraph 46 of your report, which is
15 PX5004.

16 **A.** 46.

17 (Witness examines document.) Yes.

18 **Q.** If you look at Footnote 112, which is the footnote you
19 have after you describe the Nvidia agreement; correct?

20 **A.** Yes.

21 **Q.** And Footnote 112 is a *Verge* article; correct?

22 **A.** Yes.

23 **Q.** It is not the agreement; correct?

24 **A.** That's not the agreement, that's correct.

25 **Q.** And the *Verge* article is a public article; correct?

1 **A.** Yes.

2 **Q.** And it does not include all of the terms of the Nvidia
3 agreement; correct?

4 **A.** That's -- I would assume so, yes.

5 **Q.** Especially since the terms of that agreement are
6 confidential; correct?

7 **THE COURT:** Did you read the Nvidia agreement?

8 **THE WITNESS:** I can't remember if I did. It's quite
9 possible I did, but I can't tell you for certain.

10 **THE COURT:** But wouldn't you have put that into your
11 footnote as opposed to an article?

12 **THE WITNESS:** My recollection is I was trying to
13 characterize the agreement and this article characterized the
14 agreement and, therefore, I relied on this article to
15 characterize the agreement rather than my reading of an
16 agreement and me characterizing it. Because then I -- you
17 know, someone could ask me "You're not an attorney. How do you
18 know what it means?"

19 **THE COURT:** Okay.

20 **THE WITNESS:** This is their assumption of what it's
21 saying.

22 I'd have to think back. It's likely, if the agreement was
23 available at the time of my report, that I did look at it.

24 **BY MS. FEMENELLA:**

25 **Q.** But as we established, you didn't rely on it because it's

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1 not included in your materials relied upon; correct?

2 **A.** Yes, as we've discussed already.

3 **Q.** So if you could turn in your binder to PX9453, please.

4 **A.** Say that once more please.

5 **Q.** 9453. And I will tell you, it's a bit hidden, at least it
6 was in mine. It's behind 9441.

7 **A.** (Witness examines document.) Okay.

8 **Q.** You thought this public article was pretty clear in
9 explaining the contract; correct?

10 **A.** That there was a contract, yes.

11 **Q.** In explaining the contract; correct?

12 **A.** In explaining that there was a contract, yes.

13 **MS. FEMENELLA:** Your Honor, I move to admit PX9453.

14 **THE COURT:** Admitted.

15 (Trial Exhibit 9453 received in evidence.)

16 **BY MS. FEMENELLA:**

17 **Q.** This article is dated February 21st, 2023; correct?

18 **A.** Wait. Maybe I'm -- you asked me to look at 9441?

19 **Q.** No. 9453.

20 **A.** 9453.

21 **THE COURT:** It's dated February 21st.

22 **THE WITNESS:** Yes.

23 **BY MS. FEMENELLA:**

24 **Q.** Can you please turn to page 3?

25 **A.** (Witness examines document.) Yes.

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1 Q. At the bottom do you see a quote -- the second-to-last
2 paragraph do you see a quote from Mr. Eisler?

3 A. Yes.

4 Q. It says that the companies haven't worked on detailed
5 implementation plans yet. Do you see that?

6 A. Yes.

7 Q. So as of February of 2023, Microsoft and Nvidia had not
8 worked on detailed implementation plans; correct?

9 A. Yes.

10 Q. Now, if you could turn to the next page, PX9453-004.

11 A. Yes.

12 Q. If you look at the top of that part, it says (as read):

13 "Microsoft makes me buy the game all over again?
14 Eisler won't say 'We have no announcement about Game Pass
15 right now.' When I ask him yes or no 'Does the contract
16 give you the rights or not,' he says simply 'I can't
17 answer that question.'"

18 Do you see that?

19 A. I see that, yes.

20 Q. So from this article, it is unclear whether Game Pass
21 plays a role in the contract; correct?

22 A. (Witness examines document.) Yes, from the --

23 Q. So in relying --

24 A. Yes.

25 Q. -- on this article instead of the actual agreement between

CARLTON - CROSS / FEMENELLA

1 Microsoft and Nvidia, you had no idea whether or not Game Pass
2 was included in the agreement; correct?

3 **A.** Yes. When I -- when I -- the sentence in my report -- I'd
4 have to go back in the report -- in the report is that they
5 signed agreements with these cloud providers and that's
6 contingent only if the contract -- if this transaction goes
7 through and, therefore, that additional option to be on the
8 cloud is a benefit of the transaction. I didn't speak about
9 Game Pass in that sentence.

10 (Pause in proceedings.)

11 **BY MS. FEMENELLA:**

12 **Q.** Can you please turn in your binder to RX1211? It's the
13 very next document.

14 **THE COURT:** Can I ask you, because it's 3:05, should
15 we stop or do you think we can finish this witness today?

16 **MR. KILARU:** I only have a few questions, Your Honor.

17 **MS. FEMENELLA:** My best estimate I have 10 to 15
18 minutes.

19 **THE COURT:** I think we should keep going. Is that all
20 right, Ms. Means and Ms. Knox?

21 **THE OFFICIAL REPORTER:** Yes.

22 **THE COURT:** Yes?

23 15 max.

24 **BY MS. FEMENELLA:**

25 **Q.** Looking at RX1211, again the document itself is under

1 seal, but this is the agreement between Nvidia and Microsoft;
2 correct?

3 **A.** I'm at 1211.

4 **Q.** Yes. This is agreement between Microsoft and Nvidia;
5 correct?

6 **A.** Oh. I'm sorry. Yes.

7 **Q.** You are not offering any legal opinions about any terms in
8 RX1211; correct?

9 **A.** Correct.

10 **Q.** And you didn't analyze each paragraph of the agreement;
11 correct?

12 **A.** Correct.

13 **Q.** You can put that away, sir.

14 You state in your report that an independent Activision
15 would not have made agreements to put its content on cloud
16 gaming services; correct?

17 **A.** That's my view, yes, based on the evidence.

18 **Q.** Your opinion is that the evidence is unambiguous that
19 Activision strategy is not to support cloud gaming; correct?

20 **A.** That was my view and I would say that's confirmed by the
21 testimony I heard today; but I also say that, in my report,
22 that to the extent there's a dispute about that, I leave that
23 to Your Honor to decide. But my report is based on the premise
24 that Activision's current business strategy as well as past
25 behavior is not to put their games on the cloud.

CARLTON - CROSS / FEMENELLA

1 **Q.** Sir, could you turn in your binder to PX8000 please?

2 **A.** Did you say 8000?

3 **Q.** Yes.

4 **A.** These aren't in order. Do you want to give me a hint as
5 to where that is?

6 **Q.** It's a bit hidden behind PX4984. It's 8000 that you want.

7 **A.** (Witness examines document.) PX94 I have.

8 **Q.** It should be right behind that, PX8000.

9 **A.** PX9441, RX1211, RX1212, RX2170.

10 **MS. FEMENELLA:** Your Honor, may I approach and just
11 give him my copy?

12 **THE COURT:** You may, please.

13 **THE WITNESS:** Okay. Thank you.

14 **BY MS. FEMENELLA:**

15 **Q.** PX8000 is the declaration of Mr. Eisler of Nvidia;
16 correct?

17 **A.** Yes.

18 **Q.** Now, the part that I'm going to talk to you about is under
19 seal so please don't say anything out loud, but could you
20 please turn to paragraph 43?

21 **A.** (Witness examines document.) Yes.

22 **Q.** You did not rely on paragraph 43 in forming your opinion;
23 correct?

24 **A.** Well, if it's not in Appendix B, I would not have relied
25 upon it in the sense I've described.

CARLTON - CROSS / FEMENELLA

1 **Q.** And if you look at paragraphs 45 and 46, again, since it
2 is not listed in Appendix B, you did not rely on these sworn
3 statements either; correct?

4 **A.** That's correct.

5 **Q.** You have no basis to dispute Mr. Eisler's sworn
6 assertions; correct?

7 **A.** I've not attempted to read his assertions or investigate
8 them.

9 **THE COURT:** Were you aware of them when you wrote your
10 report and you gave your opinion?

11 **THE WITNESS:** I -- I don't recall seeing this
12 particular declaration.

13 **THE COURT:** Okay. All right. That's fine. I
14 understand.

15 **BY MS. FEMENELLA:**

16 **Q.** You can put that down, sir.

17 In your report you refer to the cloud agreements Microsoft
18 signed during the pendency of this litigation; correct?

19 **A.** I refer to the cloud agreements that Microsoft signed
20 during the pendency of this litigation, yes, I do and I explain
21 why they're --

22 **Q.** You have not done any -- sorry, sir. We're trying to be
23 efficient here of the Court's time.

24 You have not done any quantification or analysis to size
25 the cloud gaming market in the future; correct?

CARLTON - CROSS / FEMENELLA

1 **A.** I have not attempted to measure the size. I did discuss
2 it, I believe, in the report, but I've not done an independent
3 investigation of the size.

4 **Q.** Sir, if you could just keep your answers to "yes" or
5 "no" --

6 **A.** Okay.

7 **Q.** -- we will be more mindful of the Court's time.

8 You have no opinions or analysis about the size or scope
9 of the cloud gaming services that Ubitus provides; correct?

10 **A.** Correct. I don't discuss that.

11 **Q.** You have no opinions or analysis about the size or scope
12 of the cloud gaming services that Boosteroid provides; correct?

13 **A.** Correct. I don't discuss that.

14 **Q.** You have no opinions or analysis about the size or scope
15 of the cloud gaming services that Nware provides; correct?

16 **A.** I don't analyze that.

17 **Q.** Do you know what country Boosteroid is located in?

18 **A.** Not immediately as I sit here. I might once have known
19 that, but I don't recall.

20 **Q.** Your report does not mention that Boosteroid is located in
21 Ukraine; correct?

22 **A.** I don't believe the report says that.

23 **Q.** You did not take Boosteroid's location into consideration
24 for your analysis; correct?

25 **A.** That's correct. It's irrelevant to my analysis where it's

1 located.

2 Q. You did not take into consideration the location of
3 Boosteroid's cloud gaming servers in your opinion; correct?

4 A. I simply -- correct. I did not analyze --

5 THE COURT: Correct. Okay.

6 BY MS. FEMENELLA:

7 Q. Do you know what country Ubitus is located in?

8 A. I don't as I sit here, no.

9 Q. Your report does not mention that Ubitus is located in
10 Taiwan; correct?

11 A. I believe that's correct, it does not mention that.

12 Q. You did not take Ubitus' location into consideration for
13 your analysis; correct?

14 A. That's correct.

15 Q. You did not take into consideration the location of
16 Ubitus' cloud gaming servers in your opinion; correct?

17 A. Correct.

18 Q. Do you know what country Nware is located in?

19 A. I -- I haven't investigated that.

20 Q. Your report does not mention that Nware is located in
21 Spain; correct?

22 A. I believe that's correct.

23 Q. You did not take Nware's location into consideration for
24 your analysis; correct?

25 A. Correct.

1 Q. You did not take into consideration the location of
2 Nware's cloud gaming servers in your opinion; correct?

3 A. Correct.

4 Q. Now, you were aware that Mr. Zimring from Google testified
5 in this court last week; correct?

6 A. I have a general understanding of that, yes.

7 Q. And Mr. Zimring was in charge of Google's Stadia; correct?

8 A. I believe that is correct.

9 Q. Mr. Zimring has substantial experience in cloud gaming
10 services; correct?

11 A. I have no reason to doubt your representation.

12 Q. You did not take into consideration Mr. Zimring's
13 testimony that the farther away a cloud gaming server is from a
14 gamer, the worse the latency gets; correct?

15 A. I did not take that -- Mr. Zimring's testimony in that
16 into account in my report.

17 Q. And the higher the latency, the lower the gaming
18 experience; correct?

19 A. I believe that, yes.

20 Q. Your opinion is that these agreements that Microsoft
21 signed during the pendency of this litigation represent the
22 creation of options that would not otherwise exist but for this
23 transaction; correct?

24 A. Correct.

25 Q. You did not verify what you conclude are efficiencies of

1 the deal; correct?

2 **A.** I don't know what you mean by that. The contracts are
3 signed. They're conditional on the transaction. That provides
4 another option that didn't otherwise -- wouldn't otherwise
5 exist. That's a benefit of the transaction. I did not attempt
6 to quantify the magnitude of that benefit.

7 (Pause in proceedings.)

8 **BY MS. FEMENELLA:**

9 **Q.** As we just discussed at length, you did not analyze the
10 agreements; correct?

11 **A.** Yes. Other than they exist, yes.

12 **Q.** You agree that the extent to which these agreements
13 provide options to consumers depends, at least in part, on the
14 language of the agreements themselves; correct?

15 **A.** In part but obviously the agreements, if they wouldn't
16 have otherwise existed, provide an option that wouldn't have
17 existed absent the agreements, and...

18 **Q.** You have not done any quantification of the benefits to
19 consumers on any of these agreements; correct?

20 **A.** I have not attempted to quantify the benefit other than to
21 point out it's a benefit.

22 **Q.** And you are not offering any quantitative analysis of the
23 value of these agreements that they may have created; correct?

24 **A.** I have not attempted to quantify the magnitude of those
25 benefits other than to point out they are benefits.

CARLTON - REDIRECT / KILARU

1 **MS. FEMENELLA:** Your Honor, I pass the witness.

2 **REDIRECT EXAMINATION**

3 **BY MR. KILARU:**

4 **Q.** Just very briefly, Dr. Carlton, is it fair to say that a
5 focus of your work was on evaluating the reliability of the
6 economic models that Dr. Lee prepared in this case?

7 **A.** Yes, that was the primary focus of my work.

8 **Q.** And just to use his terms, one was called the demand model
9 and one was called the foreclosure model. I believe I think he
10 said share model and foreclosure model yesterday. Do you
11 remember that?

12 **A.** He used share model and foreclosure model. I would prefer
13 to call it demand model because use of the term "share model"
14 implies that the only thing that matters is the Xbox share of
15 Xbox plus Sony when, in fact, his model that he referred to as
16 a share model is really a demand model that includes not just
17 the shares but also substitution to an outside option, and that
18 is what you need to analyze in order to figure out the
19 incentive to foreclose.

20 The reason for that is you are interested in the change in
21 Xbox sales. You don't care about the shares alone. You care
22 about the change in Xbox sales. And by failing to account for
23 substitution to the outside option, his demand model over --
24 when he just uses the share model instead of his entire demand
25 model, he underestimate -- he overestimates the increase in

1 Xbox sales from a hypothetical foreclosure, and I show the
2 error that it causes him in his analysis.

3 **Q.** Doctor, did you assume the markets that Professor Lee
4 defined for purposes of your analysis?

5 **A.** I used his definition -- definitions in writing my report;
6 but for the foreclosure analysis, it doesn't matter what the
7 antitrust market is. It's a very important point for
8 foreclosure analysis. Substitution to other goods are what
9 matters.

10 So if you foreclose PlayStation from Call of Duty, the
11 question is: Where do people go? He has them going to Xbox,
12 but some people will go to what he calls the outside option.
13 And if you can go to the outside option, then not as many
14 people will go to Xbox.

15 If you don't consider going to the outside option, you
16 overestimate how many people go to the Xbox and that causes you
17 to overestimate the profitability of foreclosure. So I show
18 that error in his analysis.

19 **Q.** Do you know if Dr. Lee's models account for Microsoft's
20 offer to Sony in any way?

21 **A.** They do not. My recollection is his report doesn't
22 discuss it.

23 **Q.** Does anything that occurred on cross-examination undermine
24 your analysis about the reliability of Dr. Lee's economic
25 models in this case?

PROCEEDINGS

1 **A.** Nothing at all. Nothing.

2 **MR. KILARU:** Nothing further.

3 **THE WITNESS:** My analysis had nothing to do with those
4 contracts.

5 **MR. KILARU:** Nothing further, Your Honor.

6 **THE COURT:** Anything further?

7 **MS. FEMENELLA:** No, Your Honor.

8 **THE COURT:** All right. You are excused.

9 **THE WITNESS:** Thank you.

10 (Witness excused.)

11 **THE COURT:** Okay. So let's talk about tomorrow and
12 what we have left. We have Mr. Singer by video.

13 **MR. WEINGARTEN:** I believe we have Mr. Singer by
14 video. That's a Defense call. We have Mr. Stuart and we have
15 Ms. Hood by written declaration.

16 I don't -- I thought there was a proposal this morning
17 maybe to play Mr. Singer just for Your Honor if we were short
18 on time.

19 **MS. WILKINSON:** Yes, I think it was one of the issues.

20 And we are calling Ms. Hood as our witness and Mr. Stuart
21 will be theirs so we'll be --

22 **THE COURT:** So Ms. Hood is in person?

23 **MS. WILKINSON:** She is. Mr. Stuart is in person, yes;
24 and Ms. Hood is in person but since we're trying to streamline
25 for you, we submitted her declaration on direct so it's just

PROCEEDINGS

1 their cross.

2 **THE COURT:** Okay. And then Mr. Singer by video?

3 **MR. WEINGARTEN:** Yes.

4 **MS. WILKINSON:** Yes.

5 **THE COURT:** Okay. So I need to rule on the
6 confidentiality.

7 Okay. I can come back and do that in closed session in
8 like ten minutes so that you can prepare that tonight for
9 tomorrow.

10 Then for tomorrow in terms of schedule, I don't know how
11 long you think it goes, I have to do my case management
12 conferences at 1:30, from 1:30 to 2:30. So what we could do is
13 just plan on closing at 2:30, right, and you'll have the
14 evidence in maybe by noon?

15 **MR. WEINGARTEN:** We'll do our best.

16 **MS. WILKINSON:** Whatever you want, Your Honor, we will
17 do.

18 **THE COURT:** Yeah. I mean, we can't go right up to
19 1:30 and then do CMCs and then do closings. I won't be very
20 helpful.

21 **MS. WILKINSON:** I don't think we will have much at
22 all.

23 **THE COURT:** Okay. All right. So that will be the
24 plan. So let's just plan on doing the closings at 2:30 then,
25 and we'll take our lunch break from 1:30 to 2:30 and we will do

SEALED PROCEEDINGS

1 morning breaks as well.

2 **MR. WEINGARTEN:** Great. Thank you, Your Honor.

3 **THE COURT:** All right. We're emptying the courtroom,
4 and just for the under seal matter with respect to Mr. Singer,
5 we'll resume in ten minutes.

6 **MR. WEINGARTEN:** Thank you, Your Honor.

7 (Recess taken at 3:22 p.m.)

8 (Proceedings resumed at 3:34 p.m.)

9 (The following pages 902 through 917 were placed under
10 seal by Order of the Court:)

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[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

SEALED PROCEEDINGS

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[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

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[REDACTED] [REDACTED]

[REDACTED]

[illegible]

SEALED PROCEEDINGS

(Proceedings adjourned at 3:52 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, June 28, 2023



Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter